Supreme Court, U.S.
FILED

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Shirley A. Dvorak,

Petitioner,

v.

The Disciplinary Board of the
North Dakota Supreme Court,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE NORTH DAKOTA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the North Dakota Supreme Court violates procedural due process under the Fourteenth Amendment by suspending an attorney from the practice of law under its inherent power in order to circumvent its own mandatory procedural rules governing lawyer disciplinary proceedings.

2. Whether the North Dakota Supreme Court violates procedural due process under the Fourteenth Amendment by suspending an attorney from the practice of law on the basis of a knowing violation of a rule of law where that rule of law is first announced in the same decision suspending the attorney.

PARTIES TO THE PROCEEDING

The parties to the proceeding constitute the litigants to the decision of the North Dakota Supreme Court. Each party appears below and includes the designation of either "Petitioner" or "Respondent."

Petitioner

Shirley A. Dvorak is an individual and has no corporate affiliations.

Respondent

The Disciplinary Board of the North Dakota Supreme Court.

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OPINIONS BELOW

The order of the North Dakota Supreme Court of June 13, 2000, denying the petition for rehearing, is unreported and is included at Appendix E at 36a-37a. The opinion of the North Dakota Supreme Court of May 18, 2000, is reported at *Disciplinary Action Against Dvorak*, 611 N.W.2d 1476 (N.D.2000) and is included at Appendix A at 1a-14a.

The decision of the Disciplinary Board of the North Dakota Supreme Court of November 22, 1999, dismissing the petition for discipline, is unreported and printed in Appendix B at 17a-19a. The decision of the Hearing Body for the Disciplinary Board of the North Dakota Supreme Court of September 14, 1999, is unreported and is printed in Appendix C at 20a-23a.

STATEMENT OF JURISDICTION

The North Dakota Supreme Court issued its opinion and judgment on May 18, 2000. On May 31, 2000, the Petitioner filed a Petition for Rehearing, which the North Dakota Supreme Court denied on June 13, 2000. This Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

U.S. Const., amend XIV § 1

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

North Dakota Rules for Lawyer Discipline

The pertinent sections of the North Dakota Rules for Lawyer Discipline Rules 2.1(a) and 2.3(a) (1998/1999) are set forth in relevant part in the body of this Petition.

Rule 3.1 of the North Dakota Rules for Lawyer Discipline (1998/1999) is printed at Appendix H at 42a-46a.

Rule 3.1 of the North Dakota Rules for Lawyer Discipline (effective July 1, 1999) is printed at Appendix I at 47a-52a

North Dakota Century Code

North Dakota Century Code § 32-43-03, part of North Dakota's Uniform Correction or Clarification of Defamation Act, is included at Appendix N at 69a-70a.

North Dakota Century Code § 44-04-18, the open records law for North Dakota, is printed at Appendix N at 70a-73a.

STATEMENT OF THE CASE

I. Statement Of Underlying Facts

The Petitioner Shirley A. Dvorak has been a licensed attorney in the State of North Dakota since 1976. In 1997 and 1998, the Petitioner represented Weston Berg (also a licensed attorney) in a divorce action against his wife, Brenda Berg, part of which involved an extensive and bitter child custody dispute.

The trial court appointed a guardian ad litem who then asked each of the parties for the names of persons who could provide helpful information about the children's circumstances. Brenda gave the guardian ad litem the name of her cousin, Deb Jacobs. The guardian ad litem sent Jacobs a questionnaire, to which Jacobs responded, using her computer at work to type and store her responses on the North Dakota state computer system. Jacobs was employed by the North Dakota Department Of Human Services("DHS").[1] Jacobs returned her questionnaire responses to the guardian ad litem, but also gave a copy to Brenda. A copy of the questionnaire responses was also given to Karen Mueller, a social worker in Bismarck, North Dakota.

The Petitioner deposed Jacobs on February 5, 1998. When she asked Jacobs questions about the responses, it became clear some of Jacobs' responses were not based on personal knowledge, but on statements Brenda made to Jacobs

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[1] These responses were open and available to the public under North Dakota's open records law. *See* Appendix N at 70-71a, N.D.C.C. § 44-04-18(1).

in the past. Further, some of the information in the responses was false.

On February 23, 1998, at the request of her client, Weston Berg, the Petitioner sent Jacobs a letter in which she stated that Jacobs had defamed Weston by making false and malicious statements. The letter was sent "PURSUANT TO NDCC 32-43-01 THROUGH 10," which contain the legal requirements for maintaining a defamation action in North Dakota.[2] The Petitioner attached a copy of Jacobs' responses to the questionnaire, on which Weston had redacted statements "acceptable" to him, and requested that Jacobs correct her false statements. The letter informed Jacobs that if she failed to correct her false statements, "Mr. Weston Berg will pursue all remedies available to him." *See* Appendix ("App.") G at 40a.

On March 12, 1998, the Petitioner sent a letter to DHS, advising DHS that Jacobs had stored documents relevant to the Berg divorce action on her computer at work and that the Petitioner wished to secure all writings relevant to the pending case. The letter also stated that Jacobs admitted in her deposition the information contained in the documents "to be untrue." *See* App. F at 38a-39a.

Jacobs filed a complaint with the Disciplinary Board of the North Dakota Supreme Court ("Disciplinary Board"). On July 15, 1998, counsel for the Disciplinary Board ("Disciplinary Counsel") initiated formal proceedings against Petitioner alleging that her letter to Jacobs violated North

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[2] That statute requires that a retraction be demanded within 90 days. *See* App. at N at 69a, N.D.C.C. 32-43-03(2).

Dakota Rules of Professional Conduct ("N.D.R. Prof. Cond.") 3.4(a) and that her letter to DHS violated Rule 4.4.[3]

II. Lower Tribunal Decisions

A three-member Hearing Body assembled by the North Dakota Supreme Court was assigned to conduct a hearing regarding the allegations pursuant to N.D.R.L.D. 2.3(a).[4] The Hearing Body concluded that Disciplinary Counsel had not proven the alleged violations against the Petitioner by clear and convincing evidence and recommended that the petition for discipline be dismissed. *See* App. C at 20a-23a. Disciplinary Counsel appealed to the full Disciplinary Board at which time the full board ordered additional briefs to be filed.

The Disciplinary Board, in its review pursuant to N.D.R.L.D. 3.1(F), adopted the Hearing Body's recommendation and issued its order dismissing the petition for discipline. *See* App. B at 17a-19a. *See also* App. H at

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[3] Rule 3.4(a) provides in relevant part that "[a] lawyer shall not . . . [u]nlawfully obstruct another party's access to evidence . . ." N.D.R. Prof. Cond. 3.4(a) (1998/1999). Rule 4.4 provides in relevant part, "[i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass or burden a third person . . . ." N.D.R. Prof. Cond. 4.4 (1998/1999).

[4] N.D.R.L.D. 2.3(a) provides in part that a Hearing Body is appointed by the Disciplinary Board "to conduct the hearing, make findings, and recommend action" to the Disciplinary Board, and "may consist of a three-member panel of two lawyers and one public member appointed from current or former board members. . . ." N.D.R.L.D. 2.3(a) (1998/1999).

45a-46a, N.D.R.L.D. 3.1(F). The Disciplinary Board did not issue a report recommending or imposing discipline pursuant to N.D.R.L.D. 3.1(F) and (G). *See* App. H at 46a, N.D.R.L.D.3.1(F) and (G). Thus the dismissal was without appeal pursuant to the rules adopted by the North Dakota Supreme Court.

Despite the absence of a report from the Disciplinary Board imposing or recommending discipline, as required by N.D.R.L.D. 3.1 (F) and (G), *See* App. H at 46a, Disciplinary Counsel sought review by the North Dakota Supreme Court by filing objections with the court to the Disciplinary Board's order dismissing the petition. *See* App. A at 1a. The North Dakota Supreme Court ordered simultaneous briefing by the parties and heard oral argument.

III. The North Dakota Supreme Court's Decision

On May 18, 2000, the North Dakota Supreme Court issued its decision reversing the Disciplinary Board's dismissal of the petition for discipline and, instead, ordered that the Petitioner be suspended from the practice of law for one year. *See* App. A at 1a-14a.

The North Dakota Supreme Court acknowledged Petitioner's argument that there were procedural irregularities in the manner in which Disciplinary Counsel sought review by the court, but stated that it "need not address her argument"[5] because it was invoking its "inherent disciplinary

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[5] The North Dakota Supreme Court did make the following footnote:

> We note, though it is not applicable to this appeal, N.D.R. Lawyer Discpl. 3.1(F)(1), effective July

power" pursuant to N.D.R.L.D. 3.1(H) "to institute disciplinary proceedings on our own initiative." *See* App. A at 3a-4a. However, in discussing the merits of the case, the court expressly stated that it was reviewing the case as an "appeal." *See* App. A at 4a ("On appeal, this Court reviews disciplinary proceedings de novo on the record."); App. E at 37a ("The petition for rehearing upon the appeal in the above entitled action is hereby DENIED.").

As to the merits, the North Dakota Supreme Court held, in a case of first impression, that Jacobs' responses to the guardian ad litem's questionnaire were protected by "absolute privilege" and thus could not be the basis for a defamation suit. The court held that because the Petitioner "knew or should have known" of this legal principle, she violated Rule 3.4(a) "when she threatened Jacobs with a defamation action based on Jacobs' privileged statements." *See* App. A at 5a-6a. Concerning the letter sent to DHS, the court agreed that it "served a purpose other than to embarrass Jacobs"; however, it found that the Petitioner's statement that Jacobs admitted she provided false information was "a separate and independent act" which violated Rule 4.4. *See* App. A at 7a. The court further found that the Petitioner's violations were knowing. *See* App. A at 12a. Based on this finding, the court suspended the Petitioner for one year, although recognizing the length of the suspension as "grave punishment." *Id.* at 13a.

1, 1999, now provides a mechanism for our review of an order of dismissal by the Disciplinary Board, which may be appealed by Disciplinary Counsel, the complainant, or the lawyer.

See App. A at 4a. The rule applicable to the Petitioner is printed at App. H at 45a-46a. The amended rule is printed in App. I at 51a-52a.

The Petitioner filed a petition for rehearing with the North Dakota Supreme Court, but the petition was denied without opinion. *See* App. E at 36a-37a.

IV. Petitioner's Federal Suit

The Petitioner subsequently filed an action under 42 U.S.C. § 1983 in federal district court alleging violations of her procedural and substantive due process rights under the Fifth and Fourteenth Amendments to the U.S. Constitution. *See* App. J at 55a-56a. Although the federal district court dismissed the case for lack of subject matter jurisdiction *id.* at 53a-54a, 57a-59a, the court, in its closing remarks at the hearing, expressed that it was "reluctant" to dismiss the case because of the "bizarre" and "unprecedented" manner in which the North Dakota Supreme Court heard the appeal. *See* App. M at 67a-68a; App. O at 74a-75a. The federal court noted that the state court's amendment of its rule to now expressly provide for an appeal from a dismissal by the Disciplinary Board "indicates to this court that the State Supreme Court itself recognized that the procedure used in this case was flawed." *See* App. M at 68a. In fact, the federal court judge urged the Petitioner to seek review from this Court, and strongly suggested that the North Dakota Supreme Court grant a stay of the Petitioner's suspension pending a review by this Court. *Id.* Upon motion by the Petitioner, the North Dakota Supreme Court did, in fact, grant a stay of her suspension until final disposition by this Court.

V. How The Federal Question Was Raised Or Decided.

The Petitioner first raised the due process issue when Disciplinary Counsel sought review by the North Dakota

Supreme Court. The Petitioner did not raise the due process issue in the lower tribunals, i.e., the Hearing Body and the Disciplinary Board, because the question did not arise until the North Dakota Supreme Court invoked its inherent power to bypass its own mandatory lawyer discipline procedural rules. Although she did not expressly refer to "due process" she did contest, in her appellate brief, the procedural irregularities in the manner in which the case was before the North Dakota Supreme Court. The court expressly acknowledged this argument, but stated that it need not address her argument because it was exercising its inherent power. *See* App. A at 3a. Raising the issue of procedural irregularities alerted the North Dakota Supreme Court to the federal due process concerns.

Even if raising the issue of procedural irregularities in her appellate brief was not sufficient to put the due process question before the state court, the Petitioner did expressly raise a due process issue in her petition for rehearing. She specifically argued that it violated her due process rights for "the Supreme Court to invoke its authority where the Disciplinary Board proceedings ended without any avenues by which to appeal." *See* App. D at 31a-32a. The Petitioner invoked her due process rights under federal law in citing to this Court's decision *In re Ruffalo*, 390 U.S. 544(1968), *see* App. D at 32a, where it was held that attorney disciplinary proceedings implicated federal procedural due process rights.

Raising the due process issue in the petition for rehearing was timely because the North Dakota Supreme Court's disregard of the procedural irregularities raised by the Petitioner, and its circumvention of its own procedural rules, surprised the Petitioner. Unfortunately, this is not the first time the North Dakota Supreme Court has invoked its inherent power for the purpose of disregarding its own

mandatory procedural rules for lawyer discipline. *See Matter of Disciplinary Action Against Anseth*, 562 N.W.2d 385(N.D. 1997).[6] Although the Petitioner did acknowledge the *Anseth* case in her appellate brief the Petitioner expected the court to follow its own rules, especially since the court itself had promulgated those rules. Because what the court did was a surprise, the first opportunity to raise the due process issue was in a petition for rehearing, which the Petitioner did. The North Dakota Supreme Court denied the petition for rehearing, without opinion, stating only that "the Court having considered the matter, it is hereby ORDERED AND ADJUDGED, that the petition be and is hereby DENIED." *See* App. E at 36a-37a.

On August 29, 2000, the Petitioner requested a certificate from the North Dakota Supreme Court certifying that the federal question of due process of law had been considered and passed on by the court in denying her petition for rehearing. *See* App. L at 62a. The North Dakota Supreme Court sent a letter to the Petitioner, dated August 31, 2000, stating that "[t]he Court does not sign" such certificates. *See* App. K at 60a.

REASONS FOR GRANTING THE WRIT

The Court should grant the Petition for Writ of Certiorari for the following reasons: ***First***, this Petition raises important federal constitutional questions which have not been, but should be, addressed by this Court. ***Second***, the

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[6] *Anseth* did not subsequently challenge, by petition for writ of certiorari, the manner in which proceedings were instituted by the North Dakota Supreme Court.

manner in which the North Dakota Supreme Court exercised its inherent power in order to circumvent its own mandatory procedural rules governing lawyer disciplinary proceedings conflicts both directly and in principle with prior decisions of this Court and of the U.S. Court of Appeals for the First, Second, Third, Fifth, Seventh, Eighth, Ninth, and Federal Circuits. ***Third***, the issues raised are important and will have a wide-ranging national impact on attorneys, judges, and state bars. ***Finally***, the North Dakota Supreme Court's decision is plainly erroneous.

I. Important Question Of Federal Constitutional Law

The Manner In Which The North Dakota Supreme Court Exercised Its Inherent Power Denied The Petitioner Procedural Due Process.

Under the Due Process Clause of the Fourteenth Amendment, and "basic in our system of jurisprudence[,]" a person has the right to "reasonable notice of a charge against him, and an opportunity to be heard in his defense. . ." *In re Oliver*, 333 U.S. 257, 273 (1948). These guarantees apply fully to attorney disciplinary proceedings. *Spevack v. Klein*, 385 U.S. 511, 516 (1967); *Cohen v. Hurley*, 366 U.S. 117, 129 (1961). The question is what process was due the Petitioner.

This Court has stated "that what procedures are fair, what state process is constitutionally due, ... all depend upon the particular situation presented, and that history is surely relevant to these inquiries." *Cohen*, 366 U.S. at 129-30. Historically, this Court has found a denial of due process where it found the procedures lacking in "fair[ness]," *Ruffalo*, 390 U.S. at 551, 552 (addition of a charge against

an attorney midway through disbarment proceedings, and after the attorney testified, lacked "fair notice"); or on the grounds of "principles of right and justice[,]" *Theard v. United States*, 354 U.S. 278, 282 (1957) (federal court may not disbar an attorney simply because he has been disbarred by state court).

Fairness and justice were dealt a blow by the North Dakota Supreme Court's decision that must be remedied by this Court. When the disciplinary proceedings against the Petitioner were instituted by Disciplinary Counsel at the direction of the Disciplinary Board by a Summons and Petition for Discipline, no mention was made of the North Dakota Supreme Court's reserved authority (or inherent power) under N.D.R.L.D. 3.1(H). The court's inherent power was also not mentioned or invoked by Disciplinary Counsel during the proceedings before the Hearing Body or the Disciplinary Board. Instead, the case proceeded as a formal proceeding instituted by the Disciplinary Board, which is appointed by the North Dakota Supreme Court.

When the Disciplinary Board dismissed the petition for discipline, the board's decision ended the case under N.D.R.L.D. 3.1(F) and (G). Nevertheless, Disciplinary Counsel sought and was granted appellate review by the North Dakota Supreme Court. However, neither in Disciplinary Counsel's appellate brief nor in his oral argument did he mention or seek to invoke the North Dakota Supreme Court's inherent power under Rule 3.1(H). The court's inherent power was not invoked until the North Dakota Supreme Court rendered its decision exercising its inherent power. No prior notice was given to the Petitioner that the court would be instituting proceedings, or what charges were being instituted by the court. In addition, no

opportunity to be heard was given the Petitioner. Instead, the Petitioner was denied these basic requirements of due process.

The North Dakota Supreme Court's Suspension Of The Petitioner Based On A "Knowing" Violation Of A Rule Of Law First Announced In The Same Decision Wherein She Was Suspended Denied the Petitioner Procedural Due Process

Due process of law mandates that "[a]ll are entitled to be informed as to what the state commands or forbids." *Lanzetta v. State of New Jersey*,306 U.S. 451, 453 (1939). *See also Link v. Wabash R. Co.*, 370 U.S. 626, 632 (1962) (the due process calculus may be affected by the "knowledge which the circumstances show [the offending] party may be taken to have of the consequences of his own conduct.").

The element of knowledge includes the requirement that, before an attorney may be subjected to the sanctions, he or she must be on notice that such conduct may result in sanctions. *See Boettcher v. Hartford Ins. Group*, 927 F.2d 23, 26 (1st Cir. 1991) ('The law forbids the imposition of a new rule without prior notice.'); *Eash v. Riggins Trucking, Inc.*, 757 F.2d 557, 571 (3rd Cir. 1985) (en banc) ("fundamental fairness may require some measure of prior notice to an attorney that the conduct that he or she contemplates undertaking is subject to discipline or sanction by a court."). This principle was recognized by Justices White And Marshall in their concurring opinion in *Ruffalo*:

> [M]embers of a bar can be assumed to know that certain kinds of conduct, generally condemned by responsible men, will be grounds for disbarment. This class of conduct certainly includes the criminal offenses

> traditionally known as malum in se. It also includes conduct which all responsible attorneys would recognize as improper for a member of the profession. * * * The appraisal of Petitioner's conduct is one about which reasonable men differ, not one immediately apparent to any scrupulous citizen who confronts the question. I would hold that ***a federal court may not deprive an attorney of the opportunity to practice his profession on the basis of a determination after the fact that conduct is unethical if responsible attorneys would differ in appraising the propriety of that conduct***.

Ruffalo, 390 U.S. at 555-56 (White & Marshall, JJ., concurring in result) (emphasis added).

In this case, a new rule of law was imposed on the Petitioner, and was relied upon to justify her suspension, without prior notice that her actions may be unlawful or may subject her to discipline. The court had never before held that answers given in response to a guardian ad litem's questionnaire were statements made in a judicial proceeding entitled to absolute privilege from a defamation suit. In fact, the court's most recent decision on the law of absolute privilege had held only that statements made "within the zone of absolute privilege" were covered by the statute prohibiting defamation actions for statements made in judicial proceedings, *see Pulkrabek v. Sletten*, 557 N.W.2d 223, 228 (N.D. 1998).

Additionally, responsible attorneys did differ in appraising the propriety of Petitioner's conduct. The three-member Hearing Body, which included two attorneys, *see* n.

4, *supra* recommended dismissal of the petition for discipline against the Petitioner. Although the Hearing Body did find that there "may have been a question" as to whether Jacobs' statements were protected as privileged comments, the Hearing Body concluded that the Petitioner did not violate the ethical rules of conduct. The ten-member Disciplinary Board, which included seven attorneys as required by N.D.R.L.D.2.1(a)[7], agreed with the Hearing Body and dismissed the petition for discipline against the Petitioner. Because at least nine other attorneys (all appointed by the North Dakota Supreme Court) determined that the Petitioner did not violate the ethical rules, the North Dakota Supreme Court's suspension of the Petitioner based on its after-the-fact determination that the conduct was unlawful constitutes a denial of the Petitioner's procedural due process rights to fair notice.

II. Conflicts

A. Direct Conflict With The Fifth Circuit Court Of Appeals.

The North Dakota Supreme Court's Exercise Of Its Inherent Power, In Order To Circumvent Its Own Procedural Rules, Conflicts With The Decision Of The U.S. Court Of Appeals For The Fifth Circuit In In re Thalheim, 853 F.2d 383(5th Cir. 1988) And Its Progeny.

In circumstances factually similar to this case, the Fifth Circuit, in *In re Thalheim*, 853 F.2d 383 (5th Cir. 1988),

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[7] N.D.R.D.L. 2.1(a) states in part: "The [disciplinary] board consists of ten members: seven lawyer members. . .and three public members from the state at large." N.D.R.L.D. 2.1(a) (1998/1999).

reversed a federal district court's two-year suspension of an attorney where the district court's own disciplinary rules did not provide for disciplinary proceedings in the manner initiated by the district court.

In *Thalheim*, the disciplinary rules provided that formal disciplinary proceedings were to be instituted only if the attorney panel investigating the complaint so recommends. *Id.* at 388. An attorney panel was appointed and investigated alleged misconduct against the appellant, but it made no recommendation that formal disciplinary proceedings be instituted. *Id.* at 385. Nevertheless, the district court instituted a disciplinary proceeding upon which it was found that the appellant engaged in misconduct and was ultimately suspended for two years. *Id.* at 386.

In reversing the suspension, the Fifth Circuit stated "that the court violated procedural due process by failing to follow its own requirements concerning proper disciplinary procedure when it instituted proceedings with respect to the alleged federal infractions despite the attorney panel's recommendations." *Id.* at 386. According to the Fifth Circuit, "[i]t is well-settled that federal district courts are bound by their own disciplinary rules when proceeding against attorneys for violation of ethical standards." *Id.* (citing *United States v. Stoneberger*, 805 F.2d 1391, 1393 (9th Cir.1986); *Matter of Abrams*, 521 F.2d 1094, 1104-05 (3rd Cir.), *cert. denied*, 423 U.S. 1038 (1975)).

The appellee argued three grounds to justify the district court's ruling: (1) express authority under the rule; (2) implied authority under the rule; and (3) authority under the court's inherent power. The Fifth Circuit rejected all three arguments. *Thalheim*, 853 F.2d at 387-89.

(1) ***Express authority*** - The Fifth Circuit found that the regulatory scheme was mandatory in its terms and concluded that the disciplinary rules did not authorize the district court to prosecute certain cases if the investigatory attorney panel did not recommend institution of formal proceedings. *Id.* at 387-88.

As in *Thalheim*, the relevant procedural rules in this case are mandatory. *See* App. H at 44a-46a, N.D.R.L.D. 3.1(E), (F), (G). There is no express authority for review by the North Dakota Supreme Court from a dismissal by the Disciplinary Board. *Id.* Yet, the North Dakota Supreme Court accepted and heard the appeal by Disciplinary Counsel, without express authority under the rules.[8] The Petitioner had a right to rely upon these rules, and the North Dakota Supreme Court was not permitted to ***"ignore and circumvent its rules at will to the detriment of those covered by them."*** *Thalheim*, 853 F.2d at 390 (emphasis added). This rule of law has been recognized by other state and federal courts. See *The Mississippi Bar v. Attorney G*, 630 So.2d 344, 348 (Miss. 1994) (quoting *Thalheim*); *Standing Committee On Discipline of U.S. Dist. Court for Central Dist. of California v. Yagman*, 55 F.3d 1430, 1435 n. 8 (9th Cir. 1995) (citing *Thalheim*).

(2) ***Implied authority*** - The Fifth Circuit held that "the court's disciplinary rules are to be read strictly, resolving any ambiguity in favor of the person charged" because it was the court who drafted them. *Thalheim*, 853F.2d at 388. Where the disciplinary rules made no provision for suspension

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[8] The North Dakota Supreme Court conceded this issue by amending its rules after the disciplinary proceedings were commenced against the Petitioner. *See* App. I at 50a-52a.

proceedings absent recommendation by the investigative attorney panel, the Fifth Circuit stated that to imply such a procedure under the rule "would be to make a nullity of those sections of the rule that require the designation of such a panel . . . ." *Id.* To permit the North Dakota Supreme Court to circumvent its own rules by simply invoking its inherent power would, as *Thalheim* teaches, render its mandatory procedural rules a nullity.

(3) Inherent power - The Fifth Circuit gave three reasons in denouncing the district court's exercise of its inherent power:

(i) The appellee (the disciplinary committee) did not advance the inherent power claim in its brief.

(ii) a court's ***"inherent power to discipline attorneys who practice before it does not absolve the court from the obligation to follow its own rules which it has created in order to implement its exercise of such power."*** *Id.* at 388 (citing *Stoneberger*, 805 F.2d at 1392-93 and *Abrams*, 521F.2d at 1103-05) (emphasis added). *See also Daily v. Vought Aircraft Co.*, 141 F.3d 224, 230 (5th Cir. 1998) (same).

(iii) a specific finding of "bad faith" must precede any sanction imposed under a district court's inherent powers. *Thalheim*, 853 F.2d at 388 (citing *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980)). The Fifth Circuit has continued to reaffirm the "bad faith" requirement, *see Resolution Trust Corp. v. Bright*, 6 F.3d 336, 340 (5th Cir. 1993); *Elliott v. Tilton*, 64 F.3d 213, 217 (5th Cir. 1995); *In re Sealed Appellant*, 194 F.3d 666, 671 (5th Cir. 1999), as does the Ninth Circuit, *see Peabody v. Maud Van Cortland Hill*

Schroll Trust,892 F.2d 772, 777 (9th Cir. 1989) (citing *Roadway Express, Inc. v. Piper*, 447 U.S. at 766-67).

The Fifth Circuit's reasoning applies equally to this case. First, Disciplinary Counsel never argued that sanctions could be imposed upon the Petitioner via the North Dakota Supreme Court's inherent powers. Second, the rule upon which the North Dakota Supreme Court rested the exercise of its inherent powers authorizes the court to "institute" disciplinary proceedings "on its own initiative." *See* App. H at 46a, N.D.R.L.D.3.1(H). The court, however, did not "institute" disciplinary proceedings against the Petitioner, but, instead heard the case as an appeal. This procedure was without authority under the rules. Third, there was no finding of bad faith on the part of the Petitioner by the North Dakota Supreme Court. Absent such a finding, the Petitioner's ethical violations and suspension cannot be sustained under the exercise of the court's inherent powers. To allow otherwise would be a direct conflict with the Fifth Circuit in *Thalheim* and its progeny -- a conflict that cannot be tolerated by this Court.

B. Conflicts In Principle With Prior Decisions By This Court.

The Broad Manner In Which The North Dakota Supreme Court Exercised Its Inherent Power Conflicts In Principle With Prior Decisions Of This Court Limiting The Exercise Of Inherent Powers By Courts.

This Court has long held that inherent powers are to be "'exercised with great caution. . . .'" *Chambers v. Nasco, Inc.*, 501 U.S. 32, 43 (1991) (quoting *Ex Parte Burr*, 9 Wheat. 529, 531 (1824)). Further, "[b]ecause inherent powers are shielded from direct democratic controls, they

must be exercised with restraint and discretion." *Roadway Express, Inc. v. Piper* 447 U.S. at 764. In view of this restraint and caution, this Court has placed at least two limitations on the exercise of a court's inherent powers.

The first limitation prohibits the exercise of inherent powers in order to circumvent clear and mandatory procedural rules. This limitation was recognized in *Societe Interntionale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958), where this Court rejected the Court of Appeals' reliance on inherent power to uphold a dismissal of a complaint for failure to comply with a production order because the power to dismiss depended "exclusively upon Rule 37." *Id.* at 207. This limitation was also recognized in *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988). In that case, this Court held that a federal court may not invoke its inherent supervisory powers to circumvent the harmless-error inquiry prescribed by Federal Rule of Criminal Procedure 52(a). *Id.* at 254. As this Court explained, this criminal procedural rule was "as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions." *Id.* at 255 (citation and internal marks omitted).

Thus, under *Societe Interntionale* and *Bank of Nova Scotia*, the North Dakota Supreme Court was not allowed to invoke its inherent powers in order to circumvent its own procedural rules -- rules which are just as binding as constitutional or statutory provisions. While this Court in *Chambers* recognized an exception to this rule where the procedural rules at issue are not mandatory, *see Chambers*, 501 U.S. at 51 (distinguishing *Bank of Nova Scotia*), like the rules in *Bank of Nova Scotia*, and unlike those in *Chambers*,

the procedural rules at issue in this case are mandatory. *See* App. H at 44a-46a.

The second limitation on a court's inherent power is that the exercise of such power "must comply with the mandates of due process . . ." *Chambers*, 501 U.S. at 50 (citing *Roadway Express, Inc. v. Piper,* 447 U.S. at 767). The Petitioner has already set forth in this Petition her arguments concerning the lack of due process in the North Dakota Supreme Court's exercise of its inherent power. *See* Section I.

C. Conflicts In Principle With The First, Second, Third, Fifth, Seventh, Eighth, Ninth, And Federal Circuits.

The Broad Manner In Which The North Dakota Supreme Court Exercised Its Inherent Power Conflicts In Principle With Decisions Of The First, Third, Fifth, Seventh, Eighth, Ninth, And Federal Circuits Limiting The Exercise Of Inherent Power By Courts.

The North Dakota Supreme Court's exercise of its inherent powers in order to circumvent its own mandatory procedural rules is also in conflict with the decisions of the U.S. Court of Appeals for the Third, Fifth, Seventh, Eighth, and Ninth Circuits, denouncing such practice. *See Abrams*, 521 F.3d at 1104 (Third Circuit); *Thalheim*, 853 F.2d at 388 (Fifth Circuit); *Matter Of Continental Steel Corp.*, 966 F.2d 1456, Civ. No. 91-3387 (7th Cir., June 17, 1992); *Starr v. Mandanici* 152 F.3d 741, 745 n. 12 (8th Cir. 1998); *Stoneberger*, 805 F.2d at 1393-94 (Ninth Circuit).

Similarly, the North Dakota Supreme Court's exercise of its inherent powers contrary to principles of due process

also conflicts with the decisions of the U.S. Court of Appeals for the First and Federal Circuits, which mandates compliance with due process in the exercise of inherent powers. *United States v. Kouri-Perez*, 187 F.3d 1, 13 (1st Cir. 1999); *In re Bailey*, 182 F.3d 860, 864 n. 4 (Fed. Cir. 1999).

The North Dakota Supreme Court's Failure To Give The Petitioner Prior Notice That It Would Be Invoking Its Inherent Power Conflicts In Principle With The Decisions Of The Second And Third Circuits Requiring Notice Of The Authority For The Imposition Of Sanctions.

The Second and Third Circuits have held that, before imposing sanctions on an attorney, the due process requirement of notice necessarily includes that the attorney be "forewarned of the authority under which sanctions are being considered." *Ted Lapidus, S.A.v. Vann*, 112 F.3d 91, 96 (2d Cir. 1997); *Schlaifer Nance &Co., Inc. v. Estate of Warhol*, 194 F.3d 323, 334 (2d Cir. 1999); *Jones v. Pittsburgh National Corp.*, 899 F.2d 1350, 1357 (3rd Cir. 1990); *Zuk v. Eastern Pa. Psychiatric Inst. of the Med.College of Pa.*, 103 F.3d 294, 298 (3rd Cir. 1996).

This "particularized" notice means that a party seeking sanctions must identify whether those monetary sanctions are being sought pursuant to a federal rule, a federal statute, or the court's inherent power, and the inclusion of one authority does not include all other grounds for sanctions. *Ted Lapidus, S.A.*, 112 F.3d at 96-97 (notice of sanctions under Fed. R.Civ. P. 11, but not 28 U.S.C. § 1957); *Schlaifer Nance*, 194 F.3d at 334-35 (notice of sanctions under Rule 11, § 1957, and "inherent power"); *Jones*, 899 F.2d at 1357 (notice of sanctions under Rule 11, but not § 1957); *Zuk*, 103 F.3d at 298 (same).

The first time that the Petitioner had notice that the North Dakota Supreme Court would be invoking its inherent power was after the court issued the decision which is the subject of this Petition for Writ of Certiorari.[9] Prior to this decision, at no time did Disciplinary Counsel mention, or seek to rely on, the court's inherent power as a basis for imposing sanctions on the Petitioner. The Petitioner was, thus, not given the required notice of "the authority under which sanctions [were] being considered" prior to the imposition of the sanctions.

III. Importance Of The Issues Raised By This Petition

The Issues Raised Are Important And Will Have A Wide-Ranging National Impact On Attorneys, Judges, And State Bars.

At the heart of this Petition, and in jeopardy of erosion by the decision of the North Dakota Supreme Court are very basic notions of fair play and substantial justice underlying due process.

Due process is not some insignificant cog in our justice system, subject to be disregarded at the whim of courts and judges, but it is basic to our system of jurisprudence. The concept of fair play will have little meaning in the courts

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[9] Although the sanctions addressed by the Second and Third Circuits were monetary sanctions imposed in the course of litigation, the due process standards announced by those courts apply even more so where the penalty imposed is the more drastic sanction of a suspension from the practice of law because, unlike a monetary sanction, a suspension deprives the Petitioner of her very livelihood. *See Cohen*, 366 U.S. at 145-47 (Black and Douglas, JJ., and Warren, C.J.,dissenting).

of North Dakota if the North Dakota Supreme Court's decision is allowed to stand. This arbitrariness may have repercussions in other states.

The North Dakota Supreme Court's decision stands for the proposition that a court can completely disregard blatant procedural defects, and circumvent its own procedural rules, simply by invoking its inherent power over attorneys and parties. This decision will give not only the North Dakota Supreme Court, but other state and federal courts, carte blanche authority to disregard procedural rules and invoke inherent powers whenever there is a possibility that the court is constrained by the procedural law to act. Yet, this very same court will expect attorney and parties before it to strictly abide by these same procedural rules, or risk some detriment. Procedural rules were promulgated for a reason -- to make sure that courts afford due process of law to those who come before them. Procedure is not to be cast aside and obfuscated in order to achieve a result. Such conduct by courts and counsel erodes the integrity of the system and confidence in the courts. This Court needs to emphasize that all courts in this country, even state supreme courts, must follow the rules and that they cannot do whatever they please.

The exercise of inherent powers by a state court is not an issue that has been fully addressed by this Court. Just as this Court has frequently addressed a federal court's exercise of inherent powers on numerous occasions, a state court's exercise of inherent powers is no less significant and deserves no less treatment by this Court.

While attorneys should be held to the standard of being aware of state and federal statutes and case law, they should not be held to a standard so high as to know what a particular state or federal court will decide on a yet

undetermined question of law. In fact, numerous courts have held that an attorney that acts in good faith and in an honest belief that his advice and acts were well founded and in the best interests of his client is not answerable for a mere error of judgment or for a mistake in a point of law that has not been settled by a court of last resort in his or her state and on which reasonable doubt may be entertained by well informed lawyers. This is a well-reasoned principle of advocacy which deserves protection by this Court. The only way to protect this principle is to grant certiorari in this case in order to correct the very decision seeking to undermine this principle.

In addition, if the North Dakota Supreme Court's decision were allowed to stand, it would establish a bad precedent because attorneys would then be held to a standard of having to predict how the state's highest court (or a federal court) is going to decide an issue not yet determined in that state (or federal court).

Another reason that this Court should grant review is because the decision of the North Dakota Supreme Court is out of line with the authorities. This is clearly evidenced by the conflicts (addressed in this petition) between the North Dakota Supreme Court's decision and the decisions of this Court, the circuit courts for the U.S. Court of Appeals, and other state courts. These conflicts are real and intolerable, and are contrary to our federal constitution.

The issues involved in this case are important to the entire state bar of North Dakota, as well as state bars across the United States. Numerous bar members, including judicial officers and legislators, have expressed to the Petitioner and her counsel concerns regarding the widespread uncertainty thrown into the legal profession as a result of the decision below. Furthermore, the North Dakota Supreme Court's

decision is such a far departure from accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision on writ of certiorari. Even a federal district court judge called what the North Dakota Supreme Court did "unprecedented" and "bizarre." *See* App. M at 66a, 67a; App. O at 74a, 75a.

IV. The North Dakota Supreme Court's Decision Is Plainly Erroneous.

Another reason exists for granting certiorari review in this case: the merits of the case were decided erroneously. This Court has stated that its duty "is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles [can be] constitutionally applied." *In re Primus*, 436 U.S. 412, 434 (1978). When the record is devoid of evidence of a crucial element of the offense charged, this violates due process. *Vachon v. New Hampshire*, 414 U.S. 478, 480 (1974).

The North Dakota Supreme Court's decision contains a number of substantial errors: (1) the finding of a Rule 3.4(a) violation; (2) the finding of a Rule 4.4 violation; and (3) the finding that the Petitioner acted in a knowing manner.

The basis for the finding of a Rule 3.4(a) violation is legally and factually deficient. From a legal standpoint, the North Dakota announced a new rule of law regarding the scope of absolute privilege, and then held that the Petitioner knew or should have know about this rule of law. The Petitioner could not have known, from prior case law in North Dakota, that responses to a guardian ad litem's questionnaire would be covered by absolute privilege. In fact, the court's most recent decision on the law of absolute

privilege had held only that statements made "within the zone of absolute privilege" were covered by the statute prohibiting defamation actions for statements made in judicial proceedings. *See Pulkrabek v. Sletten*, 557 N.W.2d 223, 228 (N.D. 1998). In addition, no other court had addressed this issue.

The North Dakota Supreme Court's finding of a 3.4(a) violation is factually deficient because the court completely disregarded the fact that Jacobs had typed her responses on a state-owned computer, in a file that was subject to the North Dakota open records law and accessible to the public in general. *See* App. N at 69a, N.D.C.C. § 44-04-18(1). The court also disregarded the fact that Jacobs gave a copy of her responses not only to the guardian ad litem, but also to her cousin Brenda Berg, and that a copy of Jacobs' responses was given to Karen Mueller, a social worker. Courts and authorities have held that the privilege may be lost by unnecessary or unreasonable publication. *See Sullivan v. Birmingham*, 416 N.E.2d 528, 530, 532 (Mass. App. 1981) (citing *Brown v. Collins*, 402 F.2d 209 (D.C. 1968); *Sriberg v. Raymond*, 544 F.2d 15 (1st Cir. 1977); *Asay v. Hallmark Cards, Inc.*, 594 F.2d 692 (8th Cir. 1979)). Yet, the North Dakota Supreme Court did not even address this issue.

The finding of a rule 4.4 violation is also unsupported by the evidence. There is no dispute that some of Jacobs' responses were false. Thus, the statement at issue, in the letter to DHS, was true. Nevertheless, the North Dakota Supreme Court held that this single statement did not have a substantial purpose other than to embarrass Jacobs. Yet, in making this finding, the court did not even address the Petitioner's testimony that she didn't even give a thought to embarrassing Jacobs, but instead was merely attempting to preserve her client's rights under North Dakota statutory law. The court

also failed to address the undisputed fact that Brenda Berg's attorney admitted that, based on the Petitioner's examination of Jacobs at her deposition, she did not want to call Jacobs as a witness attrial. *See* Hearing Body Transcript, of June 28, 2000, p.30. The court's disregard of this relevant evidence is tantamount to a constitutional violation.

Finally, the North Dakota Supreme Court's finding of a "knowing" violation is not supported by the evidence. The "knowing" element is a crucial element of the North Dakota Supreme Court's imposition of a one-year suspension. However, there was no factual proof of a knowing violation of Rule 3.4(a) or 4.4.

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Dated: September ____, 2000.

Respectfully submitted,

/S/_____

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APPENDIX A

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

[Filed May 18, 2000]

No. 990384

IN THE MATTER OF THE APPLICATION FOR DISCIPLINARY ACTION AGAINST SHIRLEY A. DVORAK, A MEMBER OF THE BAR OF THE STATE OF NORTH DAKOTA

Matter of Application for Disciplinary Action Against Shirley A. Dvorak

Per Curiam.

Disciplinary Counsel objects to the Disciplinary Board's dismissal of a formal complaint against Shirley A. Dvorak. We reverse the decision of the Disciplinary Board. Exercising our inherent power to discipline lawyers, we suspend Dvorak from the practice of law for a period of one year.

I.

In 1997 and 1998, Dvorak represented Weston Berg in a divorce action against his wife, Brenda Berg, part of which involved an extensive and bitter child custody dispute. The trial court appointed a guardian ad litem, Canna Christensen, who then asked each of the parties for the names of persons who could provide helpful information about the children's circumstances. Brenda gave Christensen the name of her cousin, Deb Jacobs. Christensen sent Jacobs a questionnaire, to which Jacobs responded, using her computer at work to type her responses. Dvorak obtained a copy of Jacobs' responses to the questionnaire and, when Dvorak deposed Jacobs on February 5, 1998, she asked Jacobs numerous questions pertaining to the responses. During the deposition, it became clear some of Jacobs' answers were not based on personal knowledge, but on statements Brenda made to her in the past. Further, some of the information in Jacobs' responses was inaccurate.

On February 28, 1998, Dvorak sent Jacobs a letter in which she claimed Jacobs had defamed Weston by making false and malicious statements. The letter was sent "PURSUANT TO NDCC 32-43-01 THROUGH 10," which contain the legal requirements for maintaining a defamation action in this state. Dvorak attached a copy of Jacobs' responses to the questionnaire, on which she had redacted statements "acceptable" to Weston, and indicated all other statements were to be corrected. Dvorak further stated, if Jacobs failed to correct those statements, Weston would "pursue all remedies available to him."

On March 12, 1998, Dvorak sent a letter to Jacobs' employer, the North Dakota Department of Human Services ("DHS"). In that letter, Dvorak stated Jacobs had stored documents relevant to the Berg divorce action on her computer at work and that she wished to secure all writings relevant to the pending case. Further, Dvorak stated Jacobs had admitted in her deposition that the information contained in these documents was "untrue." In another sentence, Dvorak again referred to the materials as "untrue documents."

Jacobs, with the help of an attorney she contacted after receiving Dvorak's letter, filed a complaint with the Disciplinary Board. A hearing was held on June 29, 1999, at which Disciplinary Counsel contended Dvorak's letter to Jacobs violated N.D.R. Prof. Conduct 3.4 and that her letter to DHS violated N.D.R. Prof. Conduct 4.4. The hearing body determined the violations had not been proven by clear and convincing evidence and recommended the petition for discipline be dismissed. The Disciplinary Board adopted the hearing body's recommendation on November 22, 1999.

II.

As an initial matter, Dvorak notes that the Disciplinary Board filed no report of its findings and recommendations under N.D.R. Lawyer Discipl. 3.1(G) (1999). Dvorak contends, in the absence of such a report, this Court's jurisdiction was not invoked by Disciplinary Counsel's objection to the Disciplinary Board's dismissal of the petition for discipline. We need not address her argument because we conclude this case calls for the exercise of our inherent disciplinary power.

We have recognized that our Court has a "duty to maintain the integrity of the legal profession by disciplining lawyers." Matter of Disciplinary Action Against Anseth, 1997 ND 66, ¶ 18, 562 N.W.2d 385. Thus, we have reserved authority under N.D.R. Lawyer Discipl. 3.1(H) (1999) to institute disciplinary proceedings on our own initiative. We conclude the circumstances presented by this case are serious enough to warrant the exercise of this inherent authority.[1]

III.

On appeal, this Court reviews disciplinary proceedings de novo on the record. Disciplinary Bd. v. Leier, 1997 ND 79, ¶ 3, 562 N.W.2d 741. Disciplinary counsel must prove each alleged violation of the disciplinary rules by clear and convincing evidence. Disciplinary Bd. v. Dooley, 1999 ND 184, ¶ 28, 599 N.W.2d 619. We consider each disciplinary case upon its own facts to decide what discipline is warranted. Leier, at ¶ 3.

A.

Disciplinary Counsel contends Dvorak's letter to Jacobs violated N.D.R. Prof. Conduct 3.4(a), in that it was an attempt to "unlawfully obstruct another party's access to

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[1] We note, though it is not applicable to this appeal, N.D.R. Lawyer Discpl. 3.1(F)(1), effective July 1, 1999, now provides a mechanism for our review of an order of dismissal by the Disciplinary Board, which may be appealed by Disciplinary Counsel, the complainant, or the lawyer.

evidence." He asserts Jacobs' responses to Christensen's questionnaire were privileged, and so could not have served as the basis for a defamation suit. Thus, he argues Dvorak's threat was an unlawful attempt to intimidate Jacobs into changing her responses. We agree.

There can be no liability for defamatory statements that are privileged. Soentgen v. Quain & Ramstad Clinic, P.C., 467 N.W.2d 73, 78 (N.D. 1991). "Privilege is based on the sound public policy that some communications are so socially important that the full and unrestricted exchange of information requires some latitude for mistake." Id. Under N.D.C.C. § 14-02-05(2), a communication is privileged when it is made "[i]n any legislative or judicial proceeding or in any other proceeding authorized by law." Such a statement is protected by absolute privilege; thus, even if the statement was made with actual malice, the speaker is protected from liability. Rykowsky v. Dickinson Pub. Sch. Dist. No. 1, 508 N.W.2d 348, 351 (N.D. 1993).

Answers given in response to a guardian ad litem's questionnaire are statements made in a judicial proceeding. Guardian ad litem appointments and custodial investigations and reports are initiated by court order. See N.D.C.C. §§ 14-09-06.4 and 14-09-06.3. Under N.D.C.C. § 14-09-06.3(2), a guardian ad litem investigating a child's circumstances "may consult, any person who may have information about the child. . . ." Even after a guardian ad litem completes her report and presents it to the trial court, she may be called as a witness and cross-examined regarding her findings and recommendation. N.D.C.C. § 14-09-06.3(3); Green v. Green, 1999 ND 86, ¶9, 593 N.W.2d 398. Thus, Christensen performed her duties as a guardian ad litem

under the authority of the judicial system, and responses to her questionnaire were protected by absolute privilege.

If "all persons are presumed to know the law," Tooley v. Alm, 515 N.W.2d 137, 141 (N.D. 1994), then certainly Dvorak, as a seasoned attorney, knew or should have known of the legal principles explained above. Despite that, Dvorak sent a letter to Jacobs threatening a defamation lawsuit based on privileged communications. Under N.D.C.C. § 32-43-03(1), Dvorak's letter was a predicate requirement to maintaining that action; it served no other purpose.

Dvorak argues her conduct did not violate Rule 3.4 because it did not obstruct Brenda's access to Jacobs as a witness; Brenda was still free to call Jacobs at trial. Dvorak misunderstands the rule. A lawyer violates Rule 3.4 not only when she denies access to a witness completely, but also when she unlawfully attempts to dissuade a witness from providing particular information to the court. Dvorak's letter requesting that Jacobs "correct" her privileged statements was just such an attempt. Jacobs testified at the disciplinary hearing that when she received the letter she feared she would be sued and her first thought was to protect herself and her family. Initially, Jacobs believed she should change the answers she provided on the questionnaire. Jacobs retained an attorney, who advised her not to change her responses, but to file a disciplinary complaint instead. It is irrelevant that Dvorak's attempt to intimidate Jacobs into changing her responses failed; the attempt itself violated the rule. We find Disciplinary Counsel has proven by clear and convincing evidence that Dvorak violated Rule 3.4 when she threatened Jacobs with a defamation action based on Jacobs' privileged statements.

B.

Disciplinary Counsel next argues Dvorak's letter to Jacobs' employer violated N.D.R. Prof. Conduct 4.4. The hearing body found Disciplinary Counsel had not proven by clear and convincing evidence that the letter had no purpose other than Jacobs' embarrassment. We agree that the letter served a purpose other than to embarrass Jacobs. Dvorak's letter sought preservation of any documents relevant to the divorce and also requested that these documents be removed from the public domain, both of which are legitimate purposes. However, we conclude Dvorak's statement to Jacobs' employer that Jacobs admitted she provided false information was a separate and independent act which violated Rule 4.4.

Rule 4.4 states that a "lawyer shall not use means that have no substantial purpose other than to embarrass or burden a third person. . . ." The comment to that role states:

> [r]esponsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer has no obligation to respect the rights of third persons. . . . [A] lawyer shall not . . . act on a client's behalf only to harass or maliciously injure another. . . .

Blaine Nordwall, the director of DHS's Legal Advisory Unit, testified in a deposition which was admitted as an exhibit at the disciplinary hearing, that Dvorak's characterization of the documents as untrue made no

difference in the manner in which the documents were handled following her request that they be preserved. Thus, Dvorak's statement did not serve the legitimate purposes of her letter. We conclude no substantial purpose existed for telling Jacobs' employer that Jacobs admitted making untrue statements other than to embarrass or burden Jacobs. Therefore, we find Disciplinary Counsel has proven by clear and convincing evidence that Dvorak violated Rule 4.4.

IV.

In determining the appropriate sanction for a lawyer's misconduct, we consider: (1) the duty violated; (2) the lawyer's mental state; (3) the potential or actual injury caused by the lawyer's misconduct; and (4) the existence of aggravating or mitigating factors. N.D. Stds. Imposing Lawyer Sanctions 3.0. We conclude Dvorak's letter threatening Jacobs with a defamation action interfered with the administration of justice and, therefore, violated her duties to the legal system, implicating Standard 6.0, N.D. Stds. Imposing Lawyer Sanctions. In addition, we conclude her statement to Jacobs' employer that Jacobs admitted providing untrue information violated Dvorak's duties to the public, implicating Standard 5.0, N.D. Stds. Imposing Lawyer Sanctions.

According to our standards, the possible sanctions for Dvorak's misconduct are:

> Standard 5.0 Violations of Duties Owed to the Public

5.1 Failure to Maintain Personal Integrity. Absent aggravating or mitigating circumstances upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving commission of an act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, or in cases with conduct involving dishonesty, fraud, deceit, or misrepresentation:

5.11 Disbarment is generally appropriate when:

(a) a lawyer engages in serious conduct a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses; or

(b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

5.12 Suspension is generally appropriate when a lawyer knowingly engages in conduct which does not contain the elements listed in

Standard 5.11 but that seriously adversely reflects on the lawyer's fitness to practice.

5.13 Reprimand is generally appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice.

5.14 Admonition is generally appropriate when a lawyer engages in any other conduct that reflects adversely on the lawyer's fitness to practice law.

. . . .

Standard 6.0 Violations of Duties Owed to the Legal System

6.1 False Statements, Fraud, and Misrepresentation. Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving conduct that is prejudicial to the administration of justice or that involves dishonesty, fraud, deceit, or misrepresentation to a court:

6.11 Disbarment is generally appropriate when a lawyer, with the intent to deceive the court, makes a false statement, submits a false document, or improperly withholds material

information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.

6.12 Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

6.13 Reprimand is generally appropriate when a lawyer is negligent either in determining whether statements or documents are false or in taking remedial action when material information is being withheld, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

6.14 Admonition is generally appropriate when a lawyer engages in an isolated instance of neglect in determining whether submitted statements or documents are false or in failing to disclose material information upon learning of its falsity, and causes little or no actual, or potential injury to a party, or causes little or no adverse or potentially adverse effect on the legal proceeding.

In general, disbarment and suspension are appropriate sanctions for intentional or knowing misconduct. Anseth, 1997 ND 66, ¶ 29, 562 N.W.2d 385. We find Dvorak's misconduct in this case was knowing. Her letter to Jacobs conditioned the threat of a lawsuit on Jacobs' correction of her responses to Christensen's questionnaire, which was a conscious attempt to bully Jacobs into changing her responses. Dvorak knew or should have known Jacobs' responses were privileged communications. Similarly, Dvorak knew or should have known the veracity of the information stored on Jacobs' computer at DHS would have no bearing on the treatment of her request that the documents be preserved. We find Dvorak's statements were intended only to embarrass Jacobs in her workplace.

Next, we consider the potential or actual injury caused by Dvorak's misconduct. Though Dvorak's attempt to dissuade Jacobs from providing information to the guardian ad litem failed, the actual harm her letter caused was not insubstantial. Jacobs testified Dvorak's threat of a lawsuit frightened her and that she retained an attorney to defend her, at her personal expense. The potential harm of Dvorak's misconduct is also of great concern to this Court. Our system of justice relies heavily on the willingness of our citizens to provide information; Dvorak's threat of a defamation action and her attempt to embarrass Jacobs are behaviors which erode the public's trust in our legal system, discourage citizens from coming forward, and prejudice the administration of justice

Finally, we consider relevant the existence of several aggravating factors, which we may consider in deciding the proper sanction for attorney misconduct and which may

justify an increase in the degree of discipline we impose. N.D. Stds. Imposing Lawyer Sanctions 9.1, 9.21. Among these factors are Dvorak's substantial experience in the practice of law, her refusal to acknowledge the wrongful nature of her conduct, and that, in this instance, she has committed multiple offenses. See N.D. Stds. Imposing Lawyer Sanctions 9.22(i), (g) and (d). We find an additional aggravating factor, Dvorak's prior disciplinary record, of great concern. N.D. Stds. Imposing Lawyer Sanctions 9.22(a). Dvorak has been disciplined in four previous instances. She was reprimanded in 1989 and 1995, and was admonished in 1997. Further, Dvorak was suspended from the practice of law for 30 days in 1998, upon an application for reciprocal discipline following her suspension from the practice of law in Minnesota. See Disciplinary Board v. Dvorak, 1998 ND 134, 580 N.W.2d 586; In re Disciplinary Action Against Dvorak, 554 N.W.2d 399 (Minn. 1996).

We conclude Dvorak's misconduct warrants a suspension from the practice of law for a period of one year, commencing June 30, 2000. We recognize the length of the suspension is grave punishment; however, this Court's disciplinary orders are not "empty noise," but are intended to protect the public. Disciplinary Bd. v. Larson, 512 N.W.2d 454, 457 (N.D. 1994). We conclude a lengthy suspension is necessary under the circumstances. This case marks Dvorak's fourth disciplinary sanction in five years. Less than two years ago, we imposed a 30-day suspension upon Dvorak. Before she may practice law again, Dvorak must apply for reinstatement in accordance with N.D.R. Lawyer Discipl. 4.5. In addition, in order to be reinstated she must show successful completion of the Multistate Professional Responsibility Examination. See Disciplinary Bd. v.

McDonald, 2000 ND 87, ¶ 41. Finally, we direct that Dvorak pay the costs of this disciplinary proceeding to be determined by the Disciplinary Board. See Anseth, 1997 ND 66, ¶ 31,562 N.W.2d 385.

Gerald W. VandeWalle, C.J.
Mary Muehlen Maring
William A. Neumann
Dale V. Sandstrom
Everett Nels Olson, D.J.

Everett Nels Olson, D.J., sitting in place of Kapsner, J., disqualified.

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

[Filed May 18, 2000]

No. 990384

IN THE MATTER OF THE APPLICATION FOR DISCIPLINARY ACTION AGAINST SHIRLEY A. DVORAK, A MEMBER OF THE BAR OF THE STATE OF NORTH DAKOTA	)

JUDGMENT

This matter having been heard by the Court at the March 2000 Term before:

Chief Justice Gerald W. VandeWalle, Justice William A. Neumann, Justice Dale V. Sandstrom, Justice Mary Muehlen Maring, and District Judge Everett Nels Olson, sitting in place of Justice Carol Ronning Kapsner, disqualified;

and the Court having considered the matter and filed its opinion the Shirley A. Dvorak is suspended from the practice of law for a period of one year for violations of Rule 3.4 (Fairness to Opposing Party and Counsel by unlawfully obstructing another party's access to evidence), and 4.4 (Respect for Rights of Third Persons), N.D.R. Prof. Conduct, effective June 30, 2000. Before she may practice law again, Ms. Dvorak must apply for reinstatement in accordance with Rule 4.5, N.D.R. Lawyer Discipl. Ms. Dvorak must also

successfully complete the Multistate Professional Responsibility Examination.

IT IS FURTHER ORDERED AND ADJUDGED that Shirley A. Dvorak pay the costs of the disciplinary proceeding in an amount to be determined by the Disciplinary Board.

This judgment, together with the opinion of the Court filed this date, constitutes the mandate of the Supreme Court.

Dated: May 18, 2000.

By the Court:

/s/_____
Chief Justice
North Dakota Supreme Court

Attest; /s/_____
Clerk of the Supreme Court

Seal

APPENDIX B

BEFORE THE DISCIPLINARY BOARD OF THE THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

[Dated November 22, 1999]

No. 3024-E-9804

IN THE MATTER OF THE APPLICATION FOR DISCIPLINARY ACTION AGAINST SHIRLEY A. DVORAK, A MEMBER OF THE BAR OF THE STATE OF NORTH DAKOTA	)

ORDER OF DISMISSAL

A Petition for Discipline dated July 15, 1999, was filed alleging violations of Rule 3.4(a) (Fairness to Opposing Party and Counsel), and Rule 4.4 (Respect for Rights of Third Persons), N.D.R. Prof. Conduct. On August 14, 1999, Shirley A. Dvorak filed a document entitled Motions and Alternatively an Answer of Shirley A. Dvorak, requesting the matter to be returned to the Inquiry Committee, moving to strike paragraph VI of the Petition for Discipline, denying any violation of the Rules and requesting the Petition for Discipline to be dismissed.

This matter was assigned to a Hearing Body which conducted a hearing on June 28, 1999, and filed its Report on

September 14, 1999. The Disciplinary Board considered the Hearing Body Report at its regularly scheduled meeting on November 22, 1999, with the following members present: Richard E.T. Smith, Chair; Charles J. Peterson, Vice Chair; Andrea Winkjer Collin; Maureen Holman; Dwight F. Kalash; Jerome Kettleson; Richard H. McGee, II; Thomas E. Rutten; Steven D. Tangen; and Daniel Ulmer.

The Hearing Body found that the allegation that Ms. Dvorak violated Rule 3.4(a), N.D.R. Prof. Conduct, was not proven by clear and convincing evidence in that Ms. Dvorak was attempting to use legal means to protect her client's rights and her actions were not an unlawful obstruction of access to evidence. The Hearing Body further found that the allegation that Ms. Dvorak violated Rule 4.4, N.D.R. Prof. Conduct, was not proven by clear and convincing evidence in that Ms. Dvorak's letter did not have as its substantial purpose the embarrassment or the imposition of a burden on the Complainant, Debra K. Jacobs. The Hearing Body recommended that the Petition for Discipline be dismissed.

IT IS ORDERED, that the Hearing Body Report is adopted.

IT IS FURTHER ORDERED, that the Petition for Discipline against Shirley A. Dvorak is DISMISSED.

IT IS FURTHER ORDERED, that Ms. Dvorak's request for attorney's fees relating to Disciplinary Counsel's request to file briefs on the appropriateness of the Hearing Body's recommendation of dismissal is DENIED.

Dated: November 22, 1999.

/s/_____
Richard E. T. Smith, Chair
Disciplinary Board

APPENDIX C

BEFORE THE DISCIPLINARY BOARD OF THE THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

[Dated September 14, 1999]

No. 3024-E-9804

IN THE MATTER OF THE APPLICATION FOR DISCIPLINARY ACTION AGAINST SHIRLEY A. DVORAK, A MEMBER OF THE BAR OF THE STATE OF NORTH DAKOTA	)

REPORT OF HEARING BODY

The above-entitled matter came on for hearing on June 28, 1999 in Fargo, North Dakota. The hearing body consisted of Maureen Holman, Chair; Thomas E. Rutten, and Robert Hoss. Respondent Shirley A. Dvorak was present with her attorney, Kermit E. Bye. Also present was Assistant Disciplinary Counsel Paul W. Jacobson.

The hearing body heard the testimony of witnesses Leslie Oliver, Carma Christensen, Deb Jacobs, Weston Berg, and Shirley Dvorak. The hearing body admitted exhibits introduced by both Assistant Disciplinary Counsel and respondent. Based upon all the records and files of this matter, the exhibits and testimony, and the post-hearing

written arguments of counsel, the hearing body makes the following findings and recommendations:

FINDINGS

1. Shirley A. Dvorak was admitted to practice law as an attorney and counselor at law in the courts of North Dakota on September 22, 1976 and her name has appeared since that date on the roll of attorneys admitted to the Bar of North Dakota as maintained by the Supreme Court of North Dakota.

2. Dvorak represented Weston L. Berg in a divorce action during 1997 and 1998 against Brenda M. Berg.

3. While the divorce was pending, Carma Christensen was appointed as a guardian ad litem for the children and did a custody investigation. In the course of her investigation, she submitted questionnaires to persons suggested by the parties. One of the questionnaires was filled out by Brenda's cousin, Deb Jacobs. Dvorak obtained a copy of this questionnaire.

4. Dvorak took Jacobs deposition on February 5, 1998. It became apparent during the deposition that many of Jacobs' statements in response to the questionnaire were based upon information she had received from Brenda Berg, rather than personal knowledge of the events described. Because of misinformation given to Jacobs by Brenda Berg, some of the information contained in Jacobs' response to the questionnaire was not accurate.

5. On February 23, 1998 Dvorak sent a letter to Jacobs informing her that the answers to the questionnaire defamed her client by making false and malicious statements and requesting corrections pursuant to North Dakota Century Code Chapter 32-43. Dvorāk informed Jacobs that if she failed to do so Weston Berg would pursue all remedies available to him.

6. On March 12, 1998 Dvorak wrote to Jacobs' employer, the Director of the Department of Human Services, at the North Dakota State Capitol, and informed the director that Jacobs had typed the responses to the questionnaire on her computer at work. Dvorak also informed Jacobs' employer that Jacobs "admitted in her deposition testimony that the information contained in the documents that were written by her and typed on her computer at work, to be untrue."

7. Dvorak's actions are alleged to have violated Rules 3.4(a) and 4.4 of the Rules of Professional Conduct.

8. The allegation that Dvorak violated Rule 3.4(a) has not been proven by clear and convincing evidence. Dvorak was attempting to use legal means to protect her client's rights when she informed Jacobs that her responses to the questionnaire were considered defamatory by Weston Berg. Although there may have been a question as to whether Jacobs' statements were protected as privileged comments, Dvorak's actions were not an unlawful obstruction of access to evidence.

9. The allegation that Dvorak violated Rule 4.4 has not been proven by clear and convincing evidence. The

letter to Jacobs requesting a correction of the responses to the questionnaire did not have as its substantial purpose the embarrassment or the imposition of a burden on Jacobs. The letter to Jacobs' employer was a more questionable tactic, but did have a purpose other than to embarrass a third party.

RECOMMENDATION

Based upon the above findings, it is the recommendation of the hearing body that the petition against attorney Shirley A. Dvorak be dismissed.

Dated this 7th day of September, 1999.

/s/_____
Maureen Holmam, Chair

Dated this 13th day of September, 1999.

/s/_____
Thomas E. Rutten

Dated this 9th day of September, 1999.

/s/_____
Robert Hoss

APPENDIX D

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

[Dated May 31, 2000]

No. 3024-E-9804

IN THE MATTER OF THE APPLICATION FOR DISCIPLINARY ACTION AGAINST SHIRLEY A. DVORAK, A MEMBER OF THE BAR OF THE STATE OF NORTH DAKOTA	)

PETITION OF RESPONDENT-APPELLEE SHIRLEY A. DVORAK REQUESTING REHEARING OF THIS COURT'S MAY 18, 2000 DECISION

APPELLEE'S PETITION FOR REHEARING

INTRODUCTION

Appellee Shirley Dvorak files this Petition for Rehearing respectfully requesting this Court to reconsider and rehear arguments on the decision the Court rendered in this matter on May 18, 2000, In Re: Dvorak, 2000 ND 98 (N.D. May 18, 2000).

The Appellee requests reconsideration for three reasons. First, in order to find a violation of Rule of

Professional Conduct 3.4, this Court had to reach the merits of a potential defamation that is simply not before the Court. Despite the Court's recent very clear determination that responses to a guardian ad litem are absolutely privileged from defamation claims, North Dakota law prior to this Court's May 18, 2000 decision did not foreclose the possibility of pursuing such a defamation claim. Second, the Court found that Appellee's letter to Complainant's supervisors requesting them to take an untrue document off the system was legitimate, but the mere inclusion of the word "untrue," which was in fact a true statement, was so significant that it was a separate action that crossed ethical boundaries. To suspend a lawyer for including this accurate word sets an unworkable precedent for the North Dakota bar and will have the effect of chilling advocacy in this state. Finally, Appellee requests reconsideration of the Court's determination that this matter justified *sue sponte* evoking the Court's inherent disciplinary power, setting aside the procedural missteps of the Disciplinary Counsel. Appellee requests rehearing and reconsideration of these matters, as they severely impact Appellee's career, business partners and family, and they set an unworkable precedent with uncertain guidance to the members of the North Dakota bar.

A. Appellee Had A Good Faith Basis To Send The Defamation Notice, As No Law Established A Privilege For Guardian's Statements

In order to find that Appellee violated Rule 3.4, this Court made a determination of the merits of Weston Berg's potential defamation action against Debra Jacobs. The Court based its Rule 3.4 violation on the fact that members of the

bar are presumed to know the law, and that the guardian ad litem's questionnaire responses were legally protected from defamation by absolute privilege. In re: Dvorak, 2000 ND 98 ¶ 11-12. Yet, before this Court's opinion, North Dakota law did not so clearly establish that statements of a witness to a guardian ad litem were within the zone of privilege protected from defamation. Limited North Dakota case law expounds on exactly what constitutes "Communication . . . in any . . . judicial proceeding," (N.D. Cent. Code § 14-02-05) and whether it would cover statements distributed to individuals who were not parties in the judicial proceeding. This case is not directly analogous to any North Dakota precedent. McCurdy v. Hughes, 248 N.W. 512 (N.D. 1933) (affidavit filed as part of disciplinary complaint was absolutely privileged); Stafney v. Standard Oil Co., 299 N.W. 582 (N.D. 1941) (form filed with North Dakota Workmen's Compensation Bureau was absolutely privileged); and Rykowsky v. Dickinson Pub. Sch. Dist., 508 N.W.2d 348 (N.D. 1993) (statements in a school board meeting absolutely privileged if pertinent). In Richmond v. Nodlund, 552 N.W.2d 586 (N.D. 1996), statements made to a police officer were given only qualified privilege. In this action, the guardian ad litem is an investigating entity. See N.D. Cent. Code § 14-09-06.3 (appointment of an investigator in custody proceedings). The Richmond case would have been the only remotely similar precedent, which, at most, would have alerted Appellee that she would have to establish malice on the part of Ms. Jacobs in order to prevail. It does not foreclose the defamation claim.

Add another twist exists in our case: the questionnaire was distributed to other individuals outside of any alleged zone of privilege. In Pulkrabek v. Sletten, 557 N.W.2d 225,

(N.D. 1996), this Court found statements to be privileged from defamation that were made by a former prosecuting attorney sent to the parole board, with copies to the parolee and the current prosecuting attorney. The plaintiff argued that the copies to a secretary who typed the letter, the parolee and the current prosecutor constituted publication sufficient to take the letter out of the zone of privilege. This Court noted that "all these actions were relevant to Houle's parole hearing and thus within the zone of the absolute privilege afforded by the statute." Id. at 228. This case is distinguishable for at least two reasons. First, the guardian ad litem is akin to an investigatory officer rather than a judicial officer, so there was a good faith argument that statements made to them are not privileged. The guardian ad litem in this matter supports such a contention, as she testified that the questionnaire responses are in no way privileged. (R. at 44, Resp't Br. attaches Carma Christianson Depo. at 51.) Second, since the guardian ad litem questionnaire responses were given to, at a minimum, Brenda Berg's counselor, who was not a party to the judicial proceedings, an open question remained as to whether the distribution of the statement would still render it absolutely privileged from defamation.

Further, it is noteworthy that a search of case law nationwide did not result in any cases where a guardian ad litem questionnaire was deemed to be privileged from defamation claims. How then can this Court find a violation of ethical rules for an attorney's "ignorance of the law" if there is no clear and pointed law to be informed on?

While North Dakota bar members should be held to the standard of being aware of North Dakota statutes and case law, they should not be held to a standard so high as to know

what the North Dakota Supreme Court will decide on a yet undetermined question of law. In fact, numerous courts have held that an attorney who acts in good faith and in an honest belief that his advice and acts are well founded and in the best interests of his client is not answerable for a mere error of judgment or for a mistake in a point of law that has not been settled by a court of last resort in his state and on which reasonable doubt may be entertained by well informed lawyers. Washington Elec. Coop., Inc. v. Mass. Mun. Wholesale Elec. Co., 894 F. Supp. 777 (D. Vt. 1995); Cianbro Corp. v. Jeffcoat and Martin, 804 F. Supp. 784 (D.S.C. 1992), Meagher v. Karli, 97 N.W.2d 370 (Minn. 1959). This standard is similar to the North Dakota Rules of Civil Procedure Rule 11, whereby an attorney must show that the claim was either not addressed by existing law or that it supports an extension, modification or reversal of existing law. Nygaard v. Continental Resources, Inc., 598 N.W.2d 851 (N.D. 1999) (quoting N.D. Cent. Code § 28-26-01(2)). To find a violation of Rule 3.4 is much more severe than finding the anticipated defamation action to be frivolous and sanctionable under North Dakota Rules of Civil Procedure Rule 11 if such a defamation claim were brought. Yet if the claim were brought, discovery would be had and the issue may have been briefed for summary judgment or a motion to dismiss, but it is unlikely that it would subject Appellee to sanctions under Rule 11. Since no existing law is on point in this state or elsewhere to establish a privilege associated with a guardian ad litem, Appellee's actions were reasonable and should not subject her to discipline.

Appellee testified that embarrassing Jacobs did not even enter her mind. She sent the letter as demanded by her client. If this Court maintains its position that Appellee

violated her ethical responsibilities and should have known what the law would ultimately be on this issue, Appellee's actions were inadvertent at best. Case precedent and statute is not so clear as to possibly reach the "knowing" level found by this Court, which was the justification for the severe one year suspension from the practice of law.

B. The Basis For The Rule 4.4 Violation Sets The Bar Standards Unreasonably High And Will Impede Lawyers Advocacy

It does not logically follow that although Appellee's letter to Complainant's employer was for a legitimate purpose, the inclusion of the references to the fact that the Complainant's statements were "untrue" crosses ethical boundaries, particularly where the statements on the questionnaire were admittedly untrue. Appellee's letter misstated nothing. Everything included therein was true. "Untrue" was included to give context to the document and to underscore the importance of having it effectively managed. The Court found Appellee's reasons uncompelling, noting that Ms. Jacobs' supervisor did not handle the documents any differently because they were untrue. Yet, the crucial inquiry this Court endeavored upon is the Appellee's intent in sending the letter. Intent of the sender cannot be proven by the effect the word "untrue" had on the recipient.

The Court decided that the inclusion of the references to Ms. Jacobs "untrue" statements were unnecessarily included and were intended to embarrass Ms. Jacobs, even though it was clearly established at Ms. Jacobs' deposition that there was no basis for her statements and that some were untrue. (See Appellee's Br. at 14-17.) Is the inclusion of this

word "untrue" so offensive to demand action against any member of the bar under the North Dakota Disciplinary Rules? The Hearing Body did not think so. Nor did the entire Disciplinary Board who dismissed the petition for discipline. The Court should reconsider whether the mere inclusion of the accurate word "untrue" in such a letter would subject any member of the North Dakota Bar to discipline. If so, North Dakota attorneys would be well advised to tread lightly and be non-confrontational in sending demand letters or they may be reported to the Disciplinary Board. If the violation would not be found but for the Appellee's identity and disciplinary history, which are not relevant, the Court should reconsider its ruling.

Disciplinary history is only relevant after a violation is established and is only relevant in terms of sanctions. The Standards for Imposing Lawyer Sanctions "are designed for use in imposing a sanction or sanctions *following a determination by clear and convincing evidence that a member of the legal profession has violated a provision of the North Dakota Rules of Professional Conduct.*" Toth v. Disciplinary Bd., 1997 ND 75, 562 N.W.2d 744, 747 (N.D. 1997) (emphasis original) (citing N.D. Stds. Imposing Lawyer Sanctions 1.3). The Court must determine whether both alleged violations occurred without consideration of who Appellee is or her disciplinary history. All attorneys in North Dakota are held to the same set of standards and must be judged the same. If this Court would not have found violations but for the identity of Appellee and her disciplinary history, this Court must reconsider its decision. Even if the Court would find a violation regardless of the sender's identity, the Court is urged to reconsider its decision as a matter of public policy, as discussed *infra* at Section D.

C. The 1998 Rules of Lawyer Discipline Do Not Provide A Mechanism By Which This Court Should Ignore Procedural Irregularities In The Appeal And Invoke Its Inherent Disciplinary Power.

The 1998 North Dakota Rules of Lawyer Discipline, which provide the procedure for when and how a disciplinary action should be appealed, does not allow Disciplinary Counsel's "Objections to Order for Dismissal" so Disciplinary Counsel is precluded from pursuing this Court's review and the proceeding is at a close. N.D.R. Lawyer Discip. 3.1(G). This Court acknowledged that it can only review this matter by "institut[ing] disciplinary proceedings on our own initiative." In re: Dvorak, 2000 ND 98 ¶ 6. In In re Simpson, 9 N.D. 379, 83 N.W. 541 (1900), the Court initiated proceedings by motion, yet no such motion was ever filed to initiate these new proceedings. If this is truly an initiation of a new proceeding by the Supreme Court, Appellee's due process rights require that she be afforded process, including the right to a hearing and the opportunity to present evidence and testimony to the Court. If the Supreme Court can not afford this process to Appellee, it must defer to the standard procedure of referring the matter to the Disciplinary Board and accepting their decision, which dismissed the Petition for Discipline based on the recommendations of the Hearing Body who heard live testimony. The Rules do not allow this Court to reject the Disciplinary Board's decision, initiate its own proceeding and interpose its decision without any of the process otherwise afforded in a disciplinary proceeding.

Finally, it is noteworthy that the United States Supreme Court held that disciplinary proceedings are adversary proceedings of a quasi-criminal nature. In re: Ruffalo, 88 S.Ct. 1222, 1226 (1968). Appellee was essentially acquitted by the Disciplinary Board, yet the North Dakota Supreme Court effectively initiated a new action and determined Appellee's guilt without any additional process. In addition to due process concerns, this scenario may raise double jeopardy implications. Certainly the North Dakota Supreme Court has the authority to initiate disciplinary proceedings where the Disciplinary Board chooses not to. Yet, it appears violative of due process to allow the Supreme Court to invoke its authority where the Disciplinary Board proceedings ended without any avenues by which to appeal.

D. The Court Should Reconsider Its Ruling As A Matter Of Public Policy

The Court's decision is an unfortunate regulation of the art of advocacy. Trial lawyers all over the state are now advised that they could be suspended from the practice of law if they threaten to sue where this Court ultimately determines there is no chance of success on the case. The practical result will be lawyers refusing to write demand letters where they are unsure of the ultimate merits of their client's case and will stifle advocacy in the state. This is of particular concern for attorneys who agree to take on unpopular cases or clients.

If a witness persists in spreading untruths in a legal proceeding, that the witness admits are not well grounded, this Court's decision effectively ties an attorney's hands from protecting its client due to counsel's fear of disciplinary action. As a matter of public policy, the mere protection of

a client and quest to maintain truth in a legal proceeding should not rise to the level of a violation of Rule 3.4.

The Court's decision will have the practical effect of flooding the Disciplinary Counsel's office with complaints against opposing counsel as a matter of trial strategy. And with this precedent, the Disciplinary Board and Hearing Body will likely employ more liberal views of where discipline is appropriate, resulting in more appeals to this Court. The natural result will be an over-regulated bar with less than zealous advocacy on behalf of clients.

Numerous bar members, including judicial officers and legislators, have expressed concerns regarding the widespread uncertainty thrown into the legal profession as a result of the decision in this case. Bar members often write letters to witnesses. Bar members often comment upon the facts of a case in correspondence with witnesses and other individuals with knowledge of the issues of the case. To find a violation of ethical roles for initiating legitimate, truthful correspondence like the correspondence in this case will chill an advocate's abilities to zealously represent its client. It is an extreme and unfortunate regulation of the art of advocacy.

CONCLUSION

With all due respect, it appears from the strong, pointed language of the Court that the Supreme Court may have found violations of the Disciplinary Rules based, at least in part, on the Appellee's disciplinary history. It is shocking that a member of the bar could be disciplined for mere word choices used in a legitimate demand letter or for alerting an admittedly untruthful witness that they should stop spreading

untruths about a client, particularly where the welfare and relationship with the client's children are at stake. Appellee requests that this Court objectively review whether this would be the Court's finding on these facts had it been an attorney other than Appellee. Appellee believes, and likely many North Dakota bar members hope, this result was determined based on the identity of the Appellee and her disciplinary history. Further, even if the Court determines that such actions will subject any and all bar members to discipline, Appellee urges that her actions were in no way "knowing" violations of the Rules, but were inadvertent at best, imposing a much lesser sanction. Even given her three prior disciplines (and one reciprocal discipline), a one year suspension from the practice of law is a grave sanction that will significantly affect Appellee's career, family, business partners and numerous clients that are depending on her.

If this Petition for Rehearing is granted, Appellee requests the opportunity to present testimony to the Supreme Court in this newly initiated proceeding. If the Court cannot afford this process and chooses not to defer to the Disciplinary Board's decision, at a minimum Appellee requests to have the issues rebriefed and reargued to the Court. If the Petition for Rehearing is denied, Appellee requests that this Court stay the suspension until September 1, 2000, as she has a significant and complex trial in Federal Court that begins August 1, 2000, and her client would be greatly disadvantaged if someone else had to step in for Appellee.

Dated this 31st day of May, 2000

VOGEL, WEIR, HUNKE, &
McCORMICK, LTD.

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RESPONDENT SHIRLEY DVORAK

APPENDIX E

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

- [Dated June 13, 2000]

No. 990384

IN THE MATTER OF THE APPLICATION FOR DISCIPLINARY ACTION AGAINST SHIRLEY A. DVORAK, A MEMBER OF THE BAR OF THE STATE OF NORTH DAKOTA	)

PETITION FOR REHEARING

ORDER

This matter having been heard by the Court at the March 2000 Term and an opinion having been filed on May 18, 2000, by:

Chief Justice Gerald W. VandeWalle, Justice William A. Neumann, Justice Dale V. Sandstrom, Justice Mary Muehlen Maring and District Judge Everett Nels Olson, sitting in place of Justice Carol Ronning Kapsner; disqualified;

and a petition for rehearing having been filed by Tami L. Norgard counsel for the Respondent and the Court having

considered the matter, it is hereby ORDERED AND ADJUDGED, that the petition be and is hereby DENIED.

Dated: June 13, 2000.

By the Court:

/s/_____
Gerald W. VandeWalle
Chief Justice
North Dakota Supreme Court

Attest: /s/_____
Clerk of the Supreme Court

Seal

STATE OF NORTH DAKOTA,

SS.

IN THE SUPREME COURT,

The petition for a rehearing upon the appeal in the above entitled action is hereby DENIED.

/s/_____
Gerald W. VandeWalle
/s/_____
Dale V. Sandstrom
/s/_____
William A. Neumann
/s/_____
Mary Muehlen Maring
/s/_____
Everette Nels Olson

Judges Supreme Court,
State of North Dakota.

APPENDIX F

LETTER [Dated 3/12/98]

MOSSBRUGGER, DVORAK & CARTER, P.L.L.P
311 South Fourth Street, Suite 101
Grand Forks, ND 58201-4708

JOHN H. MOSSBRUGGER
SHIRLEY A. DVORAK*
RALPH F. CARTER*
RONALD I. GALSTAD*
ALAN M. McDONAUGH*

Telephone: 1 (701) 775-8146
Fax No: 1 (701) 780-9081
*ALSO LICENSED IN MINNESOTA

March 12, 1998

State of North Dakota
Director of the Department of Human Services
Children's Special Health Services
ND State Capitol
Bismarck, ND 58501

RE: Material Stored on any computer operated by Debra K. Jacobs in reference to Weston Berg vs. Brenda Berg, Civil No. 97-C-1004, District Court Oliver County

Dear Sir:

I represent Weston L. Berg, plaintiff, in the above entitled action. Enclosed, please find a copy of the subpoena served on Debra Jacobs, who is employed by your department.

Ms. Jacobs did appear and testify at a deposition to which she was subpoenaed for, on 2-5-98. At this deposition, Ms. Jacobs did state, while under oath, that she typed and stored various documents relating to my client on a computer that she operates at her place of employment. She also stated that these documents are stored under the hard drive on the computer and it is called "Deb".

The documents are substantial, consisting of at least 12 pages, single spaced. We are aware of at least three documents that have been published on this hard drive, dated January 14, 1997, June 5, 1997, and August 23, 1997.

Ms. Jacobs also admitted in her deposition testimony that the information contained in the documents that were written by her and typed on her computer at work, to be untrue. These untrue documents remain stored on her computer hard drive.

We believe additional material related to the Weston Berg family may be stored on the computer(s) that are operated by Ms. Jacobs. We need assurance that prior to trial, we have secured all writings to afford us our legal rights to confront and defend against these writings.

Please instruct as to how this can best be accomplished, without further exposure of material damaging to Mr. Berg.

Sincerely,

/s/_____
Shirley A. Dvorak
Attorney at Law

SAD:jaw

APPENDIX G

LETTER [Dated 2/23/98]

MOSSBRUGGER, DVORAK & CARTER, P.L.L.P
311 South Fourth Street, Suite 101
Grand Forks, ND 58201-4708

JOHN H. MOSSBRUGGER
SHIRLEY A. DVORAK*
RALPH F. CARTER*
RONALD I. GALSTAD*
ALAN M. McDONAUGH*

Telephone: 1 (701) 775-8146
Fax No: 1 (701) 780-9081
*ALSO LICENSED IN MINNESOTA

February 23, 1998

Ms. Deb Jacobs
11 Santee Road
Lincoln, ND 58504

RE: REQUEST FOR CORRECTION PURSUANT TO NDCC 32-43-01 THROUGH 10

Dear Ms. Jacobs:

On or about August 23, 1997, you wrote answers to a questionnaire provided to you by Bismarck attorney, Carma Christensen, and defamed my client, Mr. Weston Berg by making false and malicious statements. (*See attached exhibit A.*) Please disregard the statements that are blackened out, Mr. Berg has acknowledged that these statements are acceptable.

Pursuant to NDCC Chapter 32-43, Mr. Weston Berg hereby requests that you correct your false statements pursuant to NDCC Chapter 32-43. If you fail to do so, Mr. Weston Berg will pursue ali remedies available to him.

Sincerely,

/s/_____
Shirley A. Dvorak

SAD/jaw
Encls.

APPENDIX H

NORTH DAKOTA RULES FOR LAWYER DISCIPLINE
(1998-1999)

Rule 3.1

PART III. GENERAL PROCEDURE.

Rule 3.1. Generally.

A. Initiation of disciplinary process. The board or district inquiry committees may consider on their own motions alleged grounds for disciplinary action or disability proceedings. All complaints other than those upon motion by the board or district inquiry committees must be in writing, signed by the complainant, and filed with the secretary.

B. Initial consideration. The chair or, upon designation by the chair, the vice chair of the district inquiry committee shall evaluate complaints received. If the lawyer is not subject to the jurisdiction of the court, the chair or vice chair shall refer the matter to the appropriate entity in the jurisdiction in which the lawyer is admitted.

C. Summary dismissal. A complaint must be summarily dismissed by the district inquiry committee if the alleged facts, if true, are not grounds for disciplinary action or disability. After summary dismissal of a complaint, the chair or vice chair, as appropriate, shall promptly notify the lawyer and complainant of the action and furnish a copy of the

complaint to the lawyer. The lawyer is not required to respond to the complaint. There is no appeal from a summary dismissal.

D. Investigation and district inquiry committee procedure.

(1) Complaints not summarily dismissed must be promptly investigated by a member of the district inquiry committee or counsel.

(2) Upon assignment of the investigator, a copy of the complaint must be provided to the lawyer.

(3) The lawyer, within twenty days of receiving the complaint, shall submit a written response to the allegations in the complaint. An extension may be granted by the chair only upon a showing of good cause. Failure to make a timely response is an admission that the factual allegations of the complaint are true for purposes of proceedings before the district inquiry committee.

(4) Before consideration by the district inquiry committee, a copy of the lawyer's written response must be provided to the complainant.

(5) Within 60 days of assignment, absent an extension from the chair, the investigator shall file a written report with the chair containing a summary of the investigation and conclusions, the response received from the lawyer, and relevant documents. An extension may be granted by the chair only upon a showing of good cause.

(6) Notice of the opportunity to appear before the district inquiry committee must be provided to the complainant unless the complaint is subject to summary dismissal under Rule 3.1C or unless in the

chair's opinion the complainer poses a threat of harm to the committee.

(7) Notice of the opportunity to appear before the district inquiry committee must be provided to the lawyer before entry of any discipline by the district inquiry committee or referral for formal proceedings.

(8) Counsel shall promptly notify the complainant and lawyer of the disposition of the complaint and the reasons. The complainant, or counsel lawyer may appeal any disposition, except a determination that there is probable cause, to the board by filing a written request for review with counsel within 30 days of mailing of notice. Upon receipt of the written request, counsel shall refer the file to the board which shall consider the merits of the appeal. The determination of the board may be the subject of a petition for leave to appeal to the court, but leave will not be granted unless the complainant shows that the board acted arbitrarily, capriciously, or unreasonably.

(9) The report required under section D(5) must be filed with the secretary upon disposition of the matter by the district inquiry committee.

E. Formal proceedings.

(1) When a district inquiry committee, or the board determines that there is probable cause to believe a lawyer committed misconduct warranting public discipline, it shall begin formal disciplinary proceedings before the board. Within 90 days, unless for good cause shown, a formal disciplinary proceeding must be instituted by counsel by filing with the board and serving upon the lawyer a petition that is sufficiently clear and specific to inform the lawyer

of the alleged misconduct. Upon receiving the petition the chair of the board shall assign the matter to a hearing body or to the board en banc.

(2) The lawyer shall serve an answer upon counsel and file the original with the board within 20 days after the service of the petition, unless the time is extended by the chair of the hearing body. In the event the lawyer fails to timely answer, the charges are admitted.

(3) If there are any material issues of fact raised by the pleadings or if the lawyer requests the opportunity to be heard in mitigation, the hearing body shall give 25 days written notice of the hearing to the lawyer, complainant, and counsel, stating the date and place of hearing. The hearing must be held in a judicial district in which the lawyer resides, is employed, or maintains an office. The notice of hearing must advise that the lawyer is entitled to be represented by counsel, to cross-examine witnesses, and to present evidence. The hearing must be recorded.

(4) The hearing body shall in every case submit to the board within 60 days after the conclusion of its hearing a report containing findings and recommendations, together with a record of its proceedings. The hearing body may request that a transcript be made. Neither the lawyer, complainant, nor counsel may be present during deliberations on the disposition of the formal complaint by the hearing body.

F. Review by board. Upon receiving the findings and recommendations fo the hearing body, the secretary shall notify counsel and the lawyer of the right to, and time within

which to, request the opportunity to present briefs and oral argument to the board. Review by the board is limited to consideration of the report from the hearing body and the record of formal proceedings, the transcript when one has been requested, and, if granted, briefs and oral argument. Within 30 days of review, the board shall file with the secretary its order dismissing the petition, imposing discipline, or its report recommending or imposing discipline.

G. Review by the court. The board shall promptly submit to the court a report containing its findings and recommendations on each matter heard other than those resulting in remand, dismissal without appeal, consent probation without appeal, or reprimand without appeal. The board's report shall contain mitigating or aggravating circumstances affecting the nature or degree of discipline recommended. A copy of the report submitted to the court must be served upon counsel, complainant, and the lawyer. Within 20 days of service of the report, the lawyer and counsel may file objections to the report. Within 50 days after service of the report, the lawyer and counsel may file briefs limited to objections timely filed under this rule. Oral arguments may be requested by the lawyer or counsel, or may be set upon the court's own motion. Briefing and oral argument will be as provided in the North Dakota Rules of Appellate Procedure.

H. Reserved authority. Nothing in these rules prevents the court from instituting disability or disciplinary proceedings on its own initiative.

APPENDIX I

NORTH DAKOTA SUPREME COURT
RULES N.D.R. LAWYER DISCIPL.

Rule 3.1

[Effective July 1, 1999]

RULE 3.1. GENERALLY.

A. **Initiation of Disciplinary Process.** The board or district inquiry committees may consider on their own motions alleged grounds for disciplinary action or disability proceedings. All complaints other than those upon motion by the board or district inquiry committees must be in writing, signed by the complainant, filed with the secretary and assigned to the appropriate inquiry committee. The secretary may assign new complaints to another inquiry committee when it appears that the inquiry committee to which the complaint would normally be assigned has a disproportionately high caseload.

B. **Initial Consideration.** The chair or, upon designation by the chair, the vice-chair of the district inquiry committee shall evaluate complaints received. If the lawyer is not subject to the jurisdiction of the court, the chair or vice chair shall refer the matter to the appropriate entity in the jurisdiction in which the lawyer is admitted.

C. **Summary Dismissal.** A complaint must he summarily dismissed by the district inquiry committee if the alleged

facts, if true, are not grounds for disciplinary action or disability. After summary dismissal of a complaint, the chair or vice-chair, as appropriate, shall promptly notify the lawyer and complainant of the action and furnish a copy of the complaint to the lawyer. The lawyer is not required to respond to the complaint. There is no appeal from a summary dismissal.

D. Investigation and District Inquiry Committee Procedures.

(1) Complaints not summarily dismissed must be promptly investigated by a member of the district inquiry committee or counsel.

(2) Upon assignment of the investigator, a copy of the complaint must be provided to the lawyer.

(3) The lawyer, within twenty days of receiving the complaint, shall submit a written response to the allegations in the complaint. An extension may be granted by the chair only upon a showing of good cause. Failure to make a timely response is an admission that the factual allegations of the complaint are true for purposes of proceedings before the district inquiry committee.

(4) Before consideration by the district inquiry committee, a copy of the lawyer's written response must be provided to the complainant.

(5) Within 60 days of assignment, absent an extension from the chair, the investigator shall file a written

report with the chair containing a summary of the investigation and conclusions, the response received from the lawyer, and relevant documents. An extension may be granted by the chair only upon a showing of good cause.

(6) Notice of the opportunity to appear before the district inquiry committee must be provided to the complainant unless the complaint is subject to summary dismissal under Rule 3.1C or unless in the chair's opinion the complainant poses a threat of harm to the committee.

(7) Notice of the opportunity to appear before the district inquiry committee must be provided to the lawyer before entry of any discipline by the district inquiry committee or referral for formal proceedings.

(8) Counsel shall promptly notify the complainant and lawyer in writing of the disposition of the complaint and the reasons for the inquiry committee's decision. The complainant, lawyer, or counsel may appeal any disposition, except a determination that there is probable cause, to the board by filing a written request for review with counsel within 30 days of mailing of notice. Upon receipt of the written request, counsel shall refer the file to the board which shall consider the merits of the appeal. The determination of the board may be the subject of a petition for leave to appeal to the court, but leave will not be granted unless the person seeking leave to appeal shows that the board acted arbitrarily, capriciously, or unreasonably.

(9) The report required under section D(5) must be filed with the secretary upon disposition of the matter by the district inquiry committee.

E. Formal Proceedings.

(1) The board shall begin a formal disciplinary proceeding within 60 days of referral of a matter to the board for formal proceedings or within 60 days of the board's determination that there is probable cause to believe a lawyer committed misconduct warranting public discipline. Counsel shall initiate the proceeding by filing with the board and serving upon the lawyer a petition that is sufficiently clear and specific to inform the lawyer of the alleged misconduct. The time within which formal proceedings must be instituted may be extended for good cause. Upon receiving the petition the chair of the board shall assign the matter to a hearing panel.

(2) The lawyer shall serve an answer upon counsel and file the original with the assigned hearing panel within 20 days after the service of the petition, unless the time is extended by the chair of the hearing panel. In the event the lawyer fails to timely answer, the charges are admitted.

(3) If there are any material issues of fact raised by the pleadings or if the lawyer requests the opportunity to be heard in mitigation, the hearing panel shall give 25 days written notice of the hearing to the lawyer, complainant, and counsel, stating the date and place of hearing. The hearing must be held in a judicial

district in which the lawyer resides, is employed, or maintains an office. The notice of hearing must advise that the lawyer is entitled to be represented by counsel, to cross-examine witnesses, and to present evidence. The hearing must be recorded. The hearing panel may request that a transcript be made.

(4) Disciplinary counsel and the respondent may submit proposed findings, conclusions, and recommendations for sanction or order of dismissal to the hearing body.

F. Review by the Court.

(1) Within 60 days of its hearing, the hearing panel shall file with the secretary its order of dismissal, consent probation or reprimand. A copy of the panel's order must be served upon counsel, the complainant, and the lawyer. Counsel, the complainant, or the lawyer may seek court review of the panel's decision. A written petition for review, stating the reasons for the requested review, must be filed with the clerk within 20 days of service of the panel's order. The petition must contain a clear statement of the reasons petitioner believes the panel's decision is arbitrary, capricious, or unreasonable. The court may provide for oral arguments or the submission of briefs.

(2) Within 60 days of its hearing, the hearing panel shall submit to the court a report containing its findings and recommendations on each matter heard other than those resulting in dismissal, consent

probation, or reprimand. The hearing panel's report shall contain mitigating or aggravating circumstances affecting the nature or degree of discipline recommended. A copy of the report submitted to the court must be served upon counsel, complainant, and the lawyer. Within 20 days of service of the report, the lawyer and counsel may file objections to the report. Within 50 days after service of the report, the lawyer and counsel may file briefs limited to objections timely filed under this rule. Oral arguments may be requested by the lawyer or counsel, or may be set upon the court's own motion. Briefing and oral argument will be as provided in the North Dakota Rules of Appellate Procedure.

G. Reserved Authority. Nothing in these rules prevents the court from instituting disability or disciplinary proceedings on its own initiative.

[Amended effective July 1, 1999. Adopted effective January 1, 1995.]

APPENDIX J

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA NORTHEASTERN DIVISION

[Filed July 11, 2000]

No. A2-00-88

Shirley A. Dvorak, *Plaintiff,*	)
v.	)
Supreme Court of the State of North Dakota, Gerald W. VandeWalle, Mary Muehlen Maring, William A. Neumann, Dale v. Sandstrom, Everett Nels Olson, *Defendants.*	)

JUDGMENT

Pursuant to the Court's Memorandum and Order of the 11th day of July, 2000,

IT IS ADJUDGED THAT plaintiff's complaint and cause of action are **DISMISSED** for lack of subject matter

jurisdiction. The security deposit in the sum of one hundred dollars ($100) shall be returned to plaintiff.

Dated this 11th day of July, 2000.

Edward J. Klecker, Clerk
United States District Court

/s/_____
By Deputy Clerk

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
NORTHEASTERN DIVISION

[Filed July 11, 2000]

No. A2-00-88

Shirley A. Dvorak,	)
Plaintiff,	)
	)
v.	)
	)
Supreme Court of the State of North Dakota, Gerald W. VandeWalle, Mary Muehlen Maring, William A. Neumann, Dale v. Sandstrom, Everett Nels Olson,	)
Defendants.	)

MEMORANDUM AND ORDER

In this case, plaintiff brings suit, via 42 U.S.C. §§ 1983 and 1988, against the Supreme Court of the State of North Dakota claiming that the Court violated her procedural and substantive due process rights by suspending her from the practice of law within North Dakota. Specifically, plaintiff claims the Court deprived her of her procedural due process rights by failing to follow established disciplinary procedures, and failing to provide her with proper notice and an opportunity to be heard. As for her substantive due process

claim, plaintiff alleges the Court abused ts power and acted in an arbitrary and capricious manner in suspending her license. Plaintiff seeks reinstatement to the bar, damages in the form of lost wages, attorneys fees and costs and expenses. Additionally, plaintiff seeks a preliminary injunction to enjoin the North Dakota Supreme Court from suspending her pending final determination of this action.

The court must put aside the merits of issuing a preliminary injunction in this matter, see Dataphase Systems, Inc. v. C.L. Systems, Inc., 640 F.2d 109 (8th Cir. 1981), and address a more basic concern: subject matter jurisdiction. Subject matter jurisdiction cannot be waived, and it is the court's duty to raise the issue *sua sponte*. State of Missouri ex rel. Missouri Highway & Transp. Comm'n v. Cuffley, 112 F.3d 1332, 1334 (8th Cir. 1997).

Plaintiff challenges a final judgment of a state supreme court. A federal district court, like this one, is without authority to review a final determination of a state supreme court in a judicial proceeding.[1] District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 476 (1983). Such review

---

[1] Since Feldman, there can be no doubt that attorney disciplinary proceedings, such as the suspension proceeding before the North Dakota Supreme Court in this case, are judicial in nature. Feldman, 460 U.S. at 479-480 (determining that proceedings involving petitions for waiver of admission requirements were judicial in nature since the court was called upon to "investigate, declare, and enforce 'liabilities as they [stood] on present or past facts and under law supposed already to exist.'" (bracketed language in original)).

can only be had in the United States Supreme Court. Id. See also 28 U.S.C. § 1257. This is generally known as the *Rooker-Feldman* doctrine.

The Eighth Circuit Court of Appeals recently summarized the doctrine in a similar case involving an attorney disbarment. See Neal v. Wilson, 112 F.3d 351, 356 (8th Cir. 1997). Wherein the court, quoting a previous case, stated:

> The *Rooker-Feldman* doctrine states that district courts do not have subject matter jurisdiction over challenges to state court decisions in judicial proceedings. The only court with jurisdiction to review decisions of state courts is the United States Supreme Court. A federal district court has jurisdiction over general constitutional challenges if these claims are not inextricably intertwined with the claim asserted in state court. A claim is inextricably intertwined if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it. In other words, *Rooker-Feldman* precludes a federal action if the relief requested in the federal action would effectively reverse the state court decision or void its ruling.

Id. (quoting Charchenko v. City of Stillwater, 47 F.3d 981, 983 (8th Cir. 1995) (internal citations omitted).

A plain reading of plaintiff's complaint makes clear that she does not bring general constitutional challenges.

Rather, she challenges the procedures that were used in her particular case and the outcome they produced. First, with regard to her procedural due process claim,[2] she alleges that the North Dakota Supreme Court erred by not following its own disciplinary procedures and by not providing her with proper legal notice or giving her an adequate opportunity to be heard. In this court's view, these issues are inextricably intertwined with that Court's decision to use its inherent authority to discipline plaintiff. See Liedtke v. State Bar of Texas, 18 F.3d 315, 317-18 (5th Cir. 1994) (dismissing case based upon *Rooker-Feldman* where attorney had, indeed, no notice and no opportunity to be heard before disbarment). This court is in no position to tell the North Dakota Supreme Court how it should use its inherent power to discipline a member of its bar.

Moreover, the relief plaintiff requests, if granted, would effectively void the North Dakota Supreme Court decision. See Neal, 112 F.3d at 356. Such relief is precluded by the *Rooker-Feldman* doctrine. Id. In short, absent specific law providing otherwise, this court has no authority to entertain a collateral attack against the final judgment of the North Dakota Supreme Court when that attack essentially requests a determination that the state court was wrong or should have proceeded differently. Plaintiff must seek such a determination with the United States Supreme Court alone. Id.

---

[2] Notedly, there is no procedural due process exception to the *Rooker-Feldman* doctrine. Snider v. City of Excelsior Springs, 154 F.3d 809, 812 (8th Cir. 1998).

With regard to her substantive due process claim, plaintiff asks this court to find that the North Dakota Supreme Court acted arbitrarily and capriciously in suspending her. This is a thinly veiled request to review the merits of that Court's decision. Whether that Court abused its power and/or acted arbitrarily and capriciously are, once again, issues inextricably intertwined with the Court's decision to discipline plaintiff. Plaintiff's substantive due process claim is not a general challenge and, thus, this court lacks authority to consider it. See id.

Notwithstanding this court's sympathy for plaintiff's situation, it is bound to follow controlling precedent. The court's hands are tied by *Rooker-Feldman;* therefore, plaintiff's motion for preliminary injunction is **DENIED** and her claims against the North Dakota Supreme Court are **DISMISSED**.

Judgement shall be entered accordingly.

Dated this 11TH day of July, 2000.

/s/_____
RICHARD W. GOLDBERG
UNITED STATES DISTRICT COURT

APPENDIX K

Letter Dated August 31, 2000

Supreme Court of North Dakota

OFFICE OF THE CLERK
600 E BOULEVARD AVE DEPT 180
BISMARK ND 58505-0530
(701) 328-2221 (Voice)
(701) 328-2884 (TDD)

Clerk of the Supreme Court
Penny Miller

Chief Deputy Clerk
Colette M. Bruggman

August 31, 2000

Ms. Shirley A. Dvorak
311 South 4th Street, Ste. 101
Grand Forks, ND 58201-4708

RE: In the Matter of the Application for Disciplinary Action - Shirley Dvorak
Supreme Court No. 990384

Your letter dated August 29, 2000, and Certificate were received in my office August 30, 2000. The Court does not sign Certificates such as was forwarded by you.

It is my understanding a copy of the Order denying your Petition for Rehearing was forwarded on your behalf to Karen Prout.

Sincerely yours

/s/_____
Penny Miller
Clerk
North Dakota Supreme Court

PM:ls

pc: Mr. Paul W. Jacobson, Disciplinary Counsel
Mr. Richard E.T. Smith, Chair, Disciplinary Board

APPENDIX L

Letter With Enclosures Dated 8/29/00

MOSSBRUGGER, DVORAK & CARTER, P.L.L.P
311 South Fourth Street, Suite 101
Grand Forks, ND 58201-4708

JOHN H. MOSSBRUGGER
SHIRLEY A. DVORAK*
RALPH F. CARTER*
RONALD I. GALSTAD*
ALAN M. McDONAUGH*

Telephone: 1 (701) 775-8146
Fax No: 1 (701) 780-9081
*ALSO LICENSED IN MINNESOTA

August 29, 2000

Ms. Penny Miller
Clerk Of North Dakota Supreme Court
600 East Boulevard Avenue
Bismarck ND 58505-0530

Re: In the Matter of the Application for Disciplinary Action against Shirley A. Dvorak, A Member of the Bar of the State of North Dakota
Civil NO. 3034-E-9804

Dear Ms. Miller:

I am in the process of preparing the Certiorari to the US Supreme Court. A due process question was raised in my petition for rehearing. The ND Supreme Court simply denied

the petition for rehearing without opinion. I would request that the Court review the enclosed certificate that indicates that the question was raised in the petition for rehearing and that it was considered by the Court in its denial. This would assist me greatly. Any assistance the Court could give relative to reviewing this in the near future would be appreciated as the time element is running near.

If the Court agrees to sign this document, I would need a certified copy. Thank you.

Sincerely,

/s/_____
Shirley A. Dvorak

Encls.

Pc: Mr. Paul Jacobson w/encl.

Letter With Enclosures - 8/29/00

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

File No. 303-E-9804

IN THE MATTER OF THE APPLICATION FOR)
DISCIPLINARY ACTION AGAINST SHIRLEY)
A. DVORAK, A MEMBER OF THE BAR OF)
THE STATE OF NORTH DAKOTA)
)

CERTIFICATE OF SUPREME COURT OF NORTH DAKOTA

The question whether the North Dakota Supreme Court's exercise of its reserved authority to institute attorney disciplinary proceedings in a case before it on appeal does not afford the attorney due process of law guaranteed by the fourteenth (14th) amendment to the U.S. Constitution was raised by the petitioner, Shirley A. Dvorak, in her petition for rehearing and was considered and passed upon by this Court in denying the petition for rehearing.

Dated this _____day of _____,2000.

_____
Justice of the North Dakota Supreme Court

APPENDIX M

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA

CHAMBERS OF
RICHARD W. GOLDBERG
JUDGE

TELEPHONE: 701/297-7040
FAX: 701/297-7045

QUENTIN N. BURDICK, UNITED STATES
COURTHOUSE
655 FIRST AVENUE Suite 410
FARGO, NORTH DAKOTA 58102-4952

July 10, 2000

Ralph P. Carter
Moosbrugger, Dvorak & Carter, P.L.L.P
311 South 4th Street
Suite 101
Grand Forks, ND 58201-4?08

Douglas A. Bahr
Attorney General's Office
900 E. Boulevard Avenue
Bismarck, ND 58505-0041

Re: Dvorak v. North Dakota Supreme Court, 2:00cv88

Letter from Judge Goldberg w/Remarks - 7/10/00

Dear Counsel:

Enclosed for your information is a printed copy of the court's closing remarks at the hearing on July 7 in this matter. The court would appreciate it if Mr. Bahr would furnish a copy of these remarks to the North Dakota Supreme Court.

Thank you.

Sincerely,

/s/_____
RICHARD W. GOLDBERG
JUDGE

Enclosure

This court has spent considerable time in research of this rather unique situation. As the court stated earlier, there is no case law in other jurisdictions to support the procedure that was taken in this matter. The only other time that this procedure took place was by the same Supreme Court in 1997.

Often District and State Court judges alike must rule in matters pertaining to the clear law of the land, and in some cases there is a reluctance on the part of judges to carry out that mandate. This is one of those cases. Therefore, it is the ruling of this court, with an order to follow later, that the motion for preliminary injunction presented by the plaintiff in this case is denied and the case is dismissed for lack of subject matter jurisdiction. The court concludes that the doctrine of Rooker-Feldman applies in this matter. To support a part of this court's reasoning the court will read a portion of the Neal v. Wilson matter, an Eighth Circuit Court of Appeals case decided on April 25, 1997.

> The *Rooker-Feldman* doctrine states that district courts do not have subject matter jurisdiction over challenges to state court decisions in judicial proceedings. Rooker v. Fidelity Trust Co., 263 U.S. 413, 416, 44 S.Ct. 149, 150, 68 L.Ed. 362 (1923); District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 476, 103 S.Ct. 1303, 1311, 75 L.Ed.2d 206 (1983). The only court with jurisdiction to review decisions of state courts is the United States Supreme Court. A federal district court has jurisdiction over general constitutional challenges if these claims are not

> inextricably intertwined with the claims asserted in state court. A claim is inextricably intertwined if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it. In other words, *Rooker-Feldman* precludes a federal action if the relief requested in the federal action would effectively reverse the state court decision or void its ruling.

While the court does not have the jurisdiction in this matter to decide the allegations made by the plaintiff regarding the procedures used to discipline her that the court makes the following remarks about this matter:

1. The rather unique way that the North Dakota Supreme Court acquired this case is unprecedented. The court recognizes that the 1999 rule change adopted by the North Dakota Supreme Court which now allows an appeal from a dismissal by a board indicates to this court that the State Supreme Court itself recognized that the procedure used in this case was flawed.

2. While the court however, has concluded that it has no jurisdiction to rule on the merits either of the case or the severity of the punishment, the court does believe, however, that plaintiff in this case should petition the State Supreme Court for a stay pending the appeal to the United States Supreme Court. The reasons the North Dakota Supreme Court should issue a stay is that the denial for the petition for rehearing was very short and the gravity of the punishment was substantial. This court believes that equity would be accomplished if that action, would be taken.

APPENDIX N

NORTH DAKOTA CENTURY CODE
§ 32-43-03

32-43-03. **Request for correction or clarification.**

1. A person may maintain an action for defamation only if the person has made a timely and adequate request for correction or clarification from the defendant or the defendant has made a correction or clarification.

2. A request for correction or clarification is timely if made within the period of limitation for commencement of an action for defamation. However, a person who, within ninety days after knowledge of the publication, fails to make a good faith attempt to request a correction or clarification may recover only provable economic loss.

3. A request for correction or clarification is adequate if the request:

   a. Is made in writing and reasonably identifies the person making the request;

   b. Specifies with particularity the statement alleged to be false and defamatory and, to the extent know, the time and place of publication;

   c. Alleges the defamatory meaning of the statement;

d. Specifies the circumstances giving rise to any defamatory meaning of the statement which arises from other than the express language of the publication; and

e. States that the alleged defamatory meaning of the statement is false.

4. In the absence of a previous adequate request, service of a summons and complaint stating a claim for relief for defamation and containing the information required in subsection 3 constitutes an adequate request for correction or clarification.

5. The period of limitation for commencement of a defamation action is tolled during the period allowed in section 32-43-06 for responding to a request for correction or clarification.

* * * * *

44-04-18. **Access to public records – Electronically stored information.**

1. Except as otherwise specifically provided by law, all records of a public entity are public records, open and accessible for inspection during reasonable office hours. As used in this subsection, "reasonable office hours" includes all regular office hours of a public entity. If a public entity does not have regular office hours, the name and telephone number of a contact person authorized to provide access to the public entity's records must be posted on the door of the

office of the public entity, if any. Otherwise, the information regarding the contact person must be filed with the secretary of state for state-level entities, for public entities defined in subdivision c of subsection 12 of section 44-04-17.1, the city auditor or designee of the city for city-level entities, or the county auditor or designee of the country for other entities.

2. Upon request for a copy of specific public records, any entity subject to subsection 1 shall furnish the requester one copy of the public records requested. A request need not be made in person or in writing, and the copy must be mailed upon request. The entity may charge a reasonable fee for making or mailing the copy, or both. An entity may require payment before making or mailing the copy, or both. If the entity is not authorized to use the fees to cover the cost of providing or mailing the copy, or both, or if a copy machine is not readily available, the entity may make arrangements for the copy to be provided or mailed, or both, by another entity, public or private, and the requester shall pay the fee to that other entity. As used in this subsection, "reasonable fee" means the actual cost to the public entity of making or mailing a copy of a record, or both, including labor, materials, postage, and equipment, but excluding any cost associated with exercising confidential or closed material under section 44-04-18.8. An entity may impose a fee not exceeding twenty-five dollars per hour per request, including the initial hour, for locating records if locating the records requires more than one hour. This subsection does not apply to

copies of public records for which a different fee is specifically provided by law.

3. Except as provided in this subsection, nothing in this section requires a public entity to create or compile a record that does not exist. Access to an electronically stored record under this section, or a copy thereof, must be provided at the requester's option in either a printed document or through any other available medium. A computer file is not an available medium if no means exist to separate or prevent the disclosure of any closed or confidential information contained in that file. Except as reasonably necessary to reveal the organization of data contained in an electronically stored record, a public entity is not required to provide an electronically stored record in a different structure, format, or organization. This section does not require a public entity to provide a requester with access to a computer terminal.

4. A state-level public entity as defined in subdivision a of subsection 12 of section 44-04-17.1 may establish procedures for providing access from an outside location to any computer data base or electronically filed or stored information maintained by that entity. The procedures must address the measures that are necessary to maintain the confidentiality of information protected by federal or state law. Except for access provided to another state-level public entity, the entity may charge a reasonable fee for providing that outside access. If the original information is keyed, entered, provided, compiled, or submitted by any political subdivision, the fees must be shared by

the state and the political subdivision, based on their proportional costs to make the data available.

5. Any request under this section for records in the possession of a public entity by a party to a criminal or civil action or adverse administrative proceeding involving that entity, or by an agent of the party, must comply with applicable discovery rules and be made to the attorney representing that entity in the criminal or civil action or adverse administrative proceeding.

6. A denial of a request for records made under this section must describe the legal authority for the denial and must be in writing if requested.

7. This section is violated when a person's right to review or receive a copy of a record that is not exempt or confidential is denied or unreasonably delayed.

8. It is not an unreasonable delay or a denial of access under this section to withhold from the public a record that is prepared at the express direction of, and for presentation to, a governing body until the record is mailed or otherwise provided to a member of the body or until the next meeting of the body, whichever occurs first. It also is not unreasonable delay or a denial of access to withhold from the public a working paper or preliminary draft until a final draft is completed, the record is distributed to a member of a governing body or discussed by the body at an open meeting, or work is discontinued on the draft but no final version has been prepared, whichever occurs first.

APPENDIX O

GRAND FORKS HERALD
Associated Press, July 8, 2000

GF LAWYER'S SUSPENSION

Federal judge says he can't overrule riding on Dvorak

- Judge calls North Dakota Supreme Court's action 'bizarre,' 'unprecedented'

FARGO

Suspended lawyer sues Supreme Court

A lawyer whose license is being suspended for a year is suing the state Supreme Court, four of its justices, and a state district judge, claiming they violated her rights when they disciplined her.

Shirley Dvorak of Grand Forks wants a federal judge to halt the Supreme Court's suspension of her law license, which is scheduled to take effect June 30. She also is suing for lost wages, attorney fees and other costs.

The Supreme Court in May moved to suspend Dvorak for one year, saying she bullied and threatened to sue a witness in a divorce case.

In its decision, the court Dvorak contended she did nothing wrong, and the Supreme Court's disciplinary board agreed. It dismissed the complaint against her last November.

But Paul Jacobson, the board's disciplinary counsel, appealed to the Supreme Court itself, which unanimously concluded the case warranted a one-year suspension.

It was the fifth time the Supreme Court has disciplined Dvorak.

By John MacDonald
Associated Press

FARGO – A federal judge on Friday refused to block the suspension of a Grand Forks attorney's law license, saying he lacks authority to overturn state court disciplinary rulings.

But U.S. District Judge Richard Goldberg said the manner in which the North Dakota Supreme Court suspended Shirley Dvorak was "bizarre" and "unprecedented."

"I have to tell you this court finds this procedure most unusual," the judge said during arguments in Fargo Friday.

Fights suspension

Dvorak sued the state Supreme Court, four of its justices and a state district judge late last month, claiming they violated her rights when they disciplined her.

She was seeking a court order from Goldberg blocking the Supreme Court's decision in May to suspend her license for one year, beginning June 30. She also was suing the court for lost wages, attorney fees and other costs.

The court suspended Dvorak for what it said were her bully tactics with a witness during a divorce and a child custody case she handled in 1998. Dvorak has maintained she did nothing that warranted disciplinary action.

The Supreme Court's disciplinary board agreed, dismissing the complaint against her last November.

But Paul Jacobson, the board's legal counsel, appealed to the Supreme Court itself. The justices unanimously concluded the case warranted a one-year suspension.

Lawyer's arguments

Dvorak's lawyer, Ralph Carter, argued Friday that the justices violated their own procedures when they agreed to reconsider Dvorak's case, then violated Dvorak's rights by not holding another hearing that she could attend before a final decision was made.

Doug Bahr, an assistant state attorney general representing the justices, said the Supreme Court has the final say in all disciplinary cases against lawyers and had an absolute right to reconsider the decision of its review board.

Federal courts, he said, have no authority to second-guess the justices' decisions.

"The request, before you is to overrule a final decision of the state Supreme Court in a (disciplinary matter," Bahr told Goldberg. "There is no authority for a federal court to do so."

Goldberg agreed, but said he was troubled that Jacobsen could – on his own – appeal a board decision to the full court.

The fact that the court later changed its procedures "indicates that the Supreme Court itself recognized the flaws in its procedures," Goldberg said.

Dvorak can still petition the U.S. Supreme Court to hear her complaint. Carter said he expects to file such a petition as early as Monday.

(2)

No. 00-402

Supreme Court, U.S.
FILED
OCT 10 2000
CLERK

In The

Supreme Court of the United States

SHIRLEY A. DVORAK,

Petitioner,

v.

THE DISCIPLINARY BOARD OF THE NORTH DAKOTA SUPREME COURT,

Respondent.

On Petition For A Writ Of Certiorari To The North Dakota Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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27pp

QUESTIONS PRESENTED

1. Whether the North Dakota Supreme Court violates procedural due process under the Fourteenth Amendment by suspending an attorney from the practice of law under its inherent power in order to circumvent its own mandatory rules governing lawyer disciplinary process.

2. Whether the North Dakota Supreme Court violates procedural due process und the Fourteenth Amendment by suspending an attorney from the practice of law on the basis of a knowing violation of a rule of law where the rule of law is first announced in the same decision suspending the attorney.

PARTIES TO THE PROCEEDINGS

The parties to the proceeding constitute the litigants to the decision of the North Dakota Supreme Court. Each party appears below and includes the designation of either "Petitioner" or "Respondent".

Petitioner

Shirley A. Dvorak

Respondent

The Disciplinary Board of the North Dakota Supreme Court

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, the disciplinary board of the North Dakota Supreme Court, respectfully requests that the Court deny the Petition for a Writ of Certiorari (hereinafter "Petition") seeking review of the decision of the North Dakota Supreme Court.

REASONS FOR DENYING THE PETITION

The Court should deny the Petition for a Writ of Certiorari for the following reasons. First, the Petitioner raises here for the first time a federal constitutional issue not raised in the state court below. Second, a significant federal question does not exist under the facts of the instant case. Third, Petitioner was not suspended from the practice of law based on a violation of a rule of law first announced in the same decision by which she was suspended. Fourth, there is no conflict between the North Dakota Supreme Court decision and any decision of the Fifth Circuit Court of Appeals or any other circuit.

A. Petitioner Raises Here For The First Time A Federal Constitutional Issue Not Raised In The State Court Below

Petitioner has asserted that she was denied due process under the Fourteenth Amendment because the North Dakota Supreme Court invoked its inherent power, referred to in Rule 3.1H of the North Dakota Rules for Lawyer Discipline, to discipline her following dismissal

of the Petition for Discipline by the North Dakota Supreme Court's disciplinary board.

This Court has noted that it is very well established that the Court will not decide federal constitutional issues raised for the first time on review of state court decisions. *Cardinale v. Louisiana*, 394 U.S. 437, 438, 89 S.Ct. 1161, 1162, 22 L.Ed.2d 398, 400 (1969). That is precisely what Petitioner is seeking to do here.

She claims that she raised the due process issue when Disciplinary Counsel sought review by the North Dakota Supreme Court. In fact, the record reflects Petitioner's full understanding, at the time the matter of her misconduct was presented to the North Dakota Supreme Court, that the court had the power to review the dismissal of disciplinary proceedings through the exercise of its inherent authority. The record also reflects that rather than raising a due process question about the North Dakota Supreme Court's exercise of its inherent authority, she simply sought to distinguish her case as one in which that authority need not be exercised.

On January 21, 2000, Petitioner filed with the North Dakota Supreme Court her "Brief of Respondent Shirley A. Dvorak to the North Dakota Supreme Court Opposing the Objections of Appellant to the Disciplinary Board's Order for Dismissal." Her first argument in that brief was entitled, "The Disciplinary Counsel Has No Basis To File Objections, As No Report Was Issued By The Disciplinary Board." *See* Respondent's Appendix at A (hereinafter App. A). In the Course of her argument, Petitioner noted that Disciplinary Counsel had filed objections without a report in *Disciplinary Action Against Anseth*, 1997 ND 66,

562 N.W.2d 385 (N.D. 1997). Petitioner specifically argued that "[t]he Supreme Court did not reach the issue of whether Disciplinary Counsel properly invoked the jurisdiction of the Supreme Court to review the order of dismissal in that case, as the Supreme Court chose to use its inherent disciplinary power there. Id. [*Anseth*], 1997 ND 66 ¶¶16-17, 562 N.W.2d at 388. The Supreme Court found that case 'serious enough for use of that inherent power' under North Dakota Rules for Lawyer Discipline 3.1 (H), ..." *See* App. A at 2a.

Petitioner went on in her brief to the North Dakota Supreme Court to argue that "[t]he Court's use of its inherent and incidental power in that case [*Anseth*] was justified. . . ." She concluded her argument by asserting that the invocation of the North Dakota Supreme Court's inherent authority was not warranted in her case. *See* App. A at 2a.

Petitioner would have this Court believe that she had raised some due process question when review of the disciplinary board's dismissal by the North Dakota Supreme Court was sought by Disciplinary Counsel. The recitation from her brief to the North Dakota Supreme Court reveals not only that she did not raise a due process question, but that she fully acknowledged and understood the inherent authority of the North Dakota Supreme Court to review dismissals of disciplinary proceedings by the disciplinary board.

Although Petitioner wrongly claims in her Petition that she had raised the due process issue in her "appellate brief," she goes on to claim she expressly raised a

due process issue in her petition for rehearing to the North Dakota Supreme Court.

Rule 40 of the North Dakota Rules of Appellate Procedure provides:

> The petition [for rehearing] shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present.

See App. B. Petitioner asserts she raised a due process issue in her petition for rehearing by including a statement that it appeared violative of due process to allow the North Dakota Supreme Court to invoke its authority where the disciplinary board proceedings ended without any avenues by which to appeal.

"At the minimum . . . there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law." *Webb v. Webb*, 451 U.S. 493, 501, 101 S.Ct. 1889, 1994, 68 L.Ed.2d 392, 398 (1981); *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 77-78, 108 S.Ct. 1645, 1650, 100 L.Ed.2d 62, 72 (1988). The "claim" in the petition for rehearing, rather than telling the North Dakota Supreme Court of a point of law or fact which it overlooked, was a vague allusion to a constitutional provision which was not something overlooked or misapprehended by the North Dakota Supreme Court. In fact, as mentioned above, the statement was an allusion to the proposition which had been acknowledged by Petitioner in her

original brief to the North Dakota Supreme Court, i.e., the North Dakota Supreme Court had the inherent authority to review dismissals of disciplinary proceedings by the disciplinary board.

With very rare exceptions, this Court has adhered to the rule in reviewing state-court judgments under 28 U.S.C. § 1257 that it will not consider a petitioner's federal claim unless it was either addressed by or properly presented to the state court that rendered the decision the Court has been asked to review. *Adams v. Robertson*, 520 U.S. 83, 86, 117 S.Ct. 1028, 137 L.Ed.2d 203, 208 (1997). Petitioner has not met her burden of showing that the due process issue was properly raised to the North Dakota Supreme Court. Rather, the record reflects that the due process issue she now raises in this Court was not only not raised, but that the process was acknowledged by her as entirely proper. At the state court level, Petitioner merely argued that her misconduct was not serious enough to call for the exercise of the North Dakota Supreme Court's inherent power.

B. A Significant Federal Question Does Not Exist Under The Facts Of The Instant Case

Petitioner asserts that the important federal question presented in her case, under the Due Process Clause of the Fourteenth Amendment, arises from the fact that she was not given notice that the North Dakota Supreme Court would invoke its inherent authority, referred to in Rule 3.1(h), North Dakota Rules for Lawyer Discipline, to review the dismissal of her case by the disciplinary board. An attorney subjected to disbarment proceedings

is "entitled to procedural due process, which includes fair notice of the charge." *In re Ruffalo*, 390 U.S. 544, 550, 88 S.Ct. 1222, 20 L.Ed.2d 117, 122 (1968).

No significant federal question is involved in this case, as Petitioner was afforded complete notice of the charges which were to be considered by the North Dakota Supreme Court. The allegations of misconduct against Petitioner were set out in the Petition for Discipline, which alleged that Petitioner violated Rules 3.4(a) and 4.4, North Dakota Rules of Professional Conduct. *See* App. C. The facts alleged in the Petition for Discipline and the Rules of Professional Conduct alleged to have been violated are the same facts and rules relied upon by the North Dakota Supreme Court when it found that Petitioner had violated the North Dakota Rules of Professional Conduct. *See* Petitioner's Appendix A at 4a-8a (hereinafter Pet. App.) Therefore, the record clearly shows that Petitioner was aware of the charges against her.

The North Dakota Supreme Court's review of the disciplinary board's dismissal of the charges did not deny Petitioner of notice of the charges against her nor did it deprive her of an opportunity to present her defense to the charges. As mentioned above, Petitioner was not only aware that the North Dakota Supreme Court, through its inherent authority, had the power to review matters dismissed by the disciplinary board, she acknowledged, in her brief to the North Dakota Supreme Court, that the court's exercise of that authority had been "justified" in the prior case of *Disciplinary Action Against Anseth*, 1997 ND 66, 562 N.W.2d 385 (N.D. 1997). The record shows that Petitioner had notice of the charges, and she had

notice that the North Dakota Supreme Court could invoke its inherent authority to review the dismissal by the disciplinary board.

C. Petitioner Was Not Suspended From The Practice Of Law Based On A Violation Of A Rule Of Law First Announced In The Same Decision By Which She Was Suspended

Petitioner was suspended from the practice of law for violations of two rules of the North Dakota Rules of Professional Conduct. Rule 3.4(a), North Dakota Rules of Professional Conduct, which provides:

> A lawyer shall not:
>
> (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value[.]

and Rule 4.4, North Dakota Rules of Professional Conduct, which provides:

> In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass or burden a third person, or use methods of obtaining evidence that violate the legal rights of such person.

See App. D.

Petitioner asserts that the North Dakota Supreme Court had never previously held that answers given to a guardian ad litem's questionnaire were statements made in a judicial proceeding and, as such, entitled to absolute privilege from a defamation suit. She is, therefore, arguing to this Court that the North Dakota Supreme Court's

determination that she violated Rule 3.4(a), North Dakota Rules for Lawyer Discipline, violated due process, on the ground that she could not have known that answers given to a guardian ad litem's questionnaire were privileged.

Petitioner is arguing that the North Dakota Supreme Court cannot discipline a lawyer for violating a rule of professional conduct unless the court has previously issued a decision on the rule. However, there was no new rule announced by the North Dakota Supreme Court in its opinion suspending Petitioner. The fact is that the law is clear in North Dakota that there can be no liability for defamatory statements that are privileged. It is equally clear that a communication is privileged when it is given in a judicial proceeding. *See* the opinion of the North Dakota Supreme Court at Pet. App. 5a-6a. The North Dakota Supreme Court held that Petitioner either knew or should have known that her threat of a defamation action against a potential witness was simply a threat that could not have been successfully carried out. The court found that Petitioner attempted to intimidate a potential witness in violation of Rule 3.4(a), North Dakota Rules of Professional Conduct.

D. There Is No Conflict Between The North Dakota Supreme Court Decision And Any Decision Of The Fifth Circuit Court Of Appeals Or Any Other Circuit

In her Petition, Petitioner asserts that there is a conflict between the North Dakota Supreme Court's decision in her case and the holding of the Fifth Circuit in *In re*

Thalheim, 853 F.2d 383 (5th Cir. 1988). It first must be pointed out that there is no conflict between the two cases as *Thalheim* dealt with the procedure and authority of a Federal District Court in the disciplining of a member of its bar, whereas Petitioner was disciplined by the highest court of North Dakota.

In *Thalheim*, the Fifth Circuit determined that the district court had not followed its own rules in initiating a disciplinary action against the lawyer as there was no reservation under those rules for initiating a disciplinary action in the absence of a recommendation by an attorney panel. The state court procedural rules that applied in Petitioner's case specifically provide, in Rule 3.1H, North Dakota Rules for Lawyer Discipline, that nothing in the rules prevents the court from instituting disability or disciplinary proceedings on its own initiative. *See* Pet. App. at 46a. The exercise of that authority by the North Dakota Supreme Court was not only recognized by Petitioner in her original brief to the North Dakota Supreme Court, as discussed above, but was also characterized by Petitioner in that brief as being justified in the prior disciplinary case of *Disciplinary Action Against Anseth*, 1997 ND 66, 562 N.W.2d 385 (N.D. 1997).

Petitioner's argument of additional supposed conflicts between the North Dakota Supreme Court in her case and other Federal Circuit cases, likewise is meritless. She makes generalized assertions that the North Dakota Supreme Court's exercise of its inherent authority is contrary to principles of due process, however none of the cases cited by her do conflict with her own case.

She makes multiple references to *Ted Lapidus, S.A. v. Vann*, 112 F.3d 91 (2nd Cir. 1997), *cert. denied*, 522 U.S. 932, 118 S.Ct. 337, 139 L.Ed.2d 262 (1997). In that case the federal district court had notified the lawyer that he had failed to comply with Rule 11, Federal Rules of Civil Procedure, but the court sanctioned the lawyer under 28 U.S.C. § 1927. The appellate court vacated the sanctions, as it found that due process required "specific" notice of the sanctioning authority being considered and the conduct alleged to be sanctionable. The crux of the due process problem that arose in *Ted Lapidus* was that there was a difference in what must be shown to find a violation of Rule 11 and what must be shown to find a violation of 28 U.S.C. § 1927. The lawyer was not, therefore, given notice of what he needed to defend himself against.

In the argument contained in her brief on the issue of an alleged conflict in principle with several of the Federal Circuits, at page 23, Petitioner asserts that the first time that she had notice that the North Dakota Supreme Court would be invoking its inherent power was after the court issued its opinion. However, as previously noted, she acknowledged that possibility in her brief to the North Dakota Supreme Court and merely argued against the court invoking that power in her particular case. Nevertheless, as discussed above, Petitioner had notice from the beginning of the disciplinary process of the sanctioning authority being considered and the conduct alleged to be sanctionable. As was previously noted, the violations of the North Dakota Rules of Professional Conduct found by the North Dakota Supreme Court were the same as those alleged in the Petition for Discipline, and the misconduct that supported those violations was also alleged

in the Petition for Discipline. Petitioner had ample notice of the allegations against her and ample opportunity to defend against them. She understood and acknowledged the procedure which provided for the review of the dismissal of the disciplinary board by the North Dakota Supreme Court. There is no conflict between the North Dakota Supreme Court's action and any Federal Circuit case.

CONCLUSION

For all of the foregoing reasons, the Petition for the Writ of Certiorari should be denied.

Dated: October 10, 2000.

Respectfully submitted,

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APPENDIX A

Legal Argument I. From The Brief Of Respondent Shirley A. Dvorak To The North Dakota Supreme Court Opposing The Objections Of Appellant To The Disciplinary Board's Order For Dismissal

* * *

LEGAL ARGUMENT

I. The Disciplinary Counsel Has No Basis To File Objections, As No Report Was Issued By The Disciplinary Board.

The North Dakota Rules for Lawyer Discipline provide specific guidelines which must be adhered to invoke this Court's review of a Disciplinary Board decision. As Disciplinary Counsel's "Objections to Order for Dismissal" is not allowed under these rules. Disciplinary Counsel is precluded from pursuing this Court's review. The rules provide:

> *Review by the Court.* The board shall promptly submit to the court a report containing its findings and recommendations on each matter heard other than those resulting in remand, dismissal without appeal, consent probation without appeal, or reprimand without appeal. . . . A copy of the report submitted to the court must be served upon counsel, complainant, and the lawyer. Within 20 days of service of the report, the lawyer and counsel may file objections to the report.

N.D.R. Lawyer Discip. 3.1(G). Here, the Disciplinary Board merely issued the Order for Dismissal without drafting or filing any report with the North Dakota Supreme Court. Disciplinary Counsel has no report to file

objections from, so this Court need not review the Order for Dismissal under N.D.R. Lawyer Discip. 3.1(G).

The Disciplinary Counsel similarly filed objections without a report in *Disciplinary Action Against Anseth*, 1997 ND 66, 562 N.W.2d 385 (N.D. 1997). The Supreme Court did not reach the issue of whether Disciplinary Counsel properly invoked the jurisdiction of the Supreme Court to review the order for dismissal in that case, as the Supreme Court chose to use its inherent disciplinary power there. *Id.*, 1997 ND 66 ¶ 16-17, 562 N.W.2d at 388. The Supreme Court found that case "serious enough for use of that inherent power" under North Dakota Rule of Lawyer Discipline 3.1(H), where Anseth violated his duties to his client by failing to surrender his client's original documents after he was discharged, failing to timely complete work undertaken prior to his discharge, and failing to inform his client of the status of the work. *Id.* The Court's use of its inherent and incidental power in that case was justified, where Attorney Anseth maliciously refused to cooperate with his former client and substantially prejudiced the client's rights. This Court found a clear violation of the Rules of Professional Conduct, which require an attorney to surrender papers and property to which a client is entitled when representation is terminated. However, there is no suggestion of such a clear cut violation of the Rules of Professional Conduct to warrant this Court's invocation of North Dakota Rule of Lawyer Discipline 3.1(H) to review this case.

* * *

APPENDIX B

Rule 40. Petition For Rehearing, North Dakota Rules Of Appellate Procedure

RULE 40. PETITION FOR REHEARING

(a) Time for Filing; Content; Answer; Action by Court if Granted. A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order. The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request. If a petition for rehearing is granted the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case.

(b) Form of Petition; Length. The petition shall be in a form prescribed by Rule 32, and copies shall be served and filed as prescribed by Rule 31(b) for the service and filing of briefs. Except by permission of the court, a petition for rehearing must not exceed 10 pages.

APPENDIX C

Petition For Discipline, In The Matter Of The Application For Disciplinary Action Against Shirley A. Dvorak, A Member Of The Bar Of The State Of North Dakota

BEFORE THE DISCIPLINARY BOARD OF THE

SUPREME COURT OF THE STATE OF NORTH DAKOTA

IN THE MATTER OF THE APPLICATION FOR DISCIPLINARY ACTION AGAINST SHIRLEY A DVORAK, A MEMBER OF THE BAR OF THE STATE OF NORTH DAKOTA	)))))))	PETITION FOR DISCIPLINE File No. 3034-E-9804

It is alleged as follows:

I.

Shirley A. Dvorak was admitted to practice law as an attorney and counselor at law in the courts of North Dakota on September 22, 1976, and her name has appeared since that date on the roll of attorneys admitted to the Bar of North Dakota as maintained by the Supreme Court of North Dakota.

II.

Dvorak represented Weston L. Berg in a divorce action during 1997 and 1998 against Brenda M. Berg.

III.

During the course of the divorce action, the Guardian Ad Litem for the children of the parties submitted a written questionnaire to a cousin of Brenda, Debra K. Jacobs, which Ms. Jacobs answered. Dvorak obtained a copy of the statement.

IV.

On February 23, 1998, Dvorak wrote a letter to Ms. Jacobs with the re line of Request For Correction Pursuant To NDCC 32-43-01 Through 10. In the letter, Dvorak asserted that the answers Ms. Jacobs had provided to the guardian ad litem contained false and malicious statements that defamed her client. Dvorak attached to her letter a copy of the questionnaire, with answers. Approximately 34 lines of the attachment, which was nine pages long, were entirely or partially blackened out. Dvorak's letter told Ms. Jacobs to ignore the portions of the statement that were blackened out, as Mr. Berg acknowledged these statements were true. Dvorak concluded her letter by claiming that she was requesting Ms. Jacobs, pursuant to NDCC Chapter 32-43, to correct "your false statements". She then stated "If you fail to do so, Mr. Weston Berg will pursue all remedies available to him."

V.

On March 12, 1998, Dvorak wrote a letter to Ms. Jacobs employer, in which she told that Ms. Jacobs had informed her that the questionnaire and answers were

prepared on her office computer and that the information was stored on the computer's hard drive. Dvorak also wrote "Ms. Jacobs also admitted in her deposition testimony that the information contained in the documents that were written by her and typed on her computer at work, to be untrue. These untrue documents remain stored on her computer hard drive."

VII.

This conduct of Shirley A. Dvorak violates the following Rules of Professional Conduct:

1. RULE 3.4(a), RPC, FAIRNESS TO OPPOSING PARTY AND COUNSEL, which provides A lawyer shall not unlawfully obstruct another party's access to evidence, in that Dvorak attempted to intimidate a potential witness for the purpose of dissuading her from giving evidence, to-wit Debra K. Jacobs, by improperly threatening her ith a defamation action and falsely informing her employer that she had admitted that the information she had typed on her computer at work was untrue;

and

2. RULE 4.4, RPC, RESPECT FOR RIGHTS OF THIRD PERSONS, which provides that in representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person, in that Dvorak attempted to intimidate a potential witness for the purpose of dissuading her from giving evidence, to-wit Debra K. Jacobs, by improperly threatening her with a defamation action and falsely

informing her employer that she had admitted that the information she had typed on her computer at work was untrue;

VI.

It is specifically alleged as an aggravating factor in discipline, under Standard 9.22(a), prior disciplinary offenses, North Dakota Standards for Imposing Lawyer Sanctions, that Shirley A. Dvorak was:

1. suspended from the practice of law for thirty days, effective August 8, 1998, by Order of the North Dakota Supreme Court, in Supreme Court No. 970341, File No. 2782-E-9611, as reciprocal discipline for suspension from practice for 30 days imposed by the Minnesota Supreme Court for receiving a greater payment from bankruptcy clients than allowed by the Court, as reported at 554 NW2d 399 (Minn. 1996);

2. that Shirley A. Dvorak received an admonition on March 1, 1997, in File No. 2767-E-9610, for violation of Rule 3.4, fairness to opposing party and counsel and Rule 1.2(A)(3), NDRLD, conduct involving dishonesty, fraud, deceit or misrepresentation and Rule 1.2(8), NDRLD, conduct prejudicial to the administration of justice, for presenting documents to opposing counsel and the Court as affidavits that had been signed before her as notary public, although she knew that these individuals had not executed the documents in her presence as stated;

3. that Shirley A. Dvorak received a reprimand from the Disciplinary Board on August 18, 1995, in File No. 2503-E-9504, for misdemeanor conviction of filing a fraudulent federal income tax return;

4. that Shirley A. Dvorak received a private reprimand on February 18, 1989, in File No. 1555-E-88, for violation of Rule 3.1 in that she filed an attorney's lien without a basis that is not frivolous.

Said discipline has been ineffective in deterring conduct of Shirley A. Dvorak which is in violation of the North Dakota Rules of Professional Conduct.

WHEREFORE, it is the request that Attorney Shirley A. Dvorak be disciplined.

Dated this 15 day of July, 1998.

/s/ Paul W. Jacobson
Paul W. Jacobson (ID 03631)
Assistant Disciplinary Counsel
Disciplinary Board of the
Supreme Court
P.O. Box 2297
Bismarck, ND 58502
(701) 328-3925

Dated this 15th day of July, 1998.

/s/ Vivian E. Berg
Vivian E. Berg (ID 03548)
Disciplinary Counsel

APPENDIX D

Rules 3.4(a) And 4.4, North Dakota Rules Of Professional Conduct

RULE 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value;

RULE 4.4 RESPECT FOR RIGHTS OF THIRD PERSONS

In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

Supreme Court, U.S.
FILED
NOV 3 2000
CLERK

(3)

No. 00-402

IN THE
SUPREME COURT OF THE UNITED STATES

Shirley A. Dvorak,
Petitioner,

v.

The Disciplinary Board of the
North Dakota Supreme Court,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE NORTH DAKOTA SUPREME COURT

PETITIONER'S REPLY BRIEF

SHIRLEY A. DVORAK, *pro se*
MOOSBRUGGER, DVORAK
& CARTER, P.L.L.P.
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21pp

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REPLY TO RESPONDENT'S REASONS FOR DENYING THE WRIT

On or about October 10, 2000, Respondent, The Disciplinary Board of the North Dakota Supreme Court, filed a Brief in Opposition to the Petition for a Writ of Certiorari. Pursuant to Supreme Court Rule 15.6, Petitioner addresses the four new points raised by Respondent.

I. The Federal Constitutional Issue Raised In This Petition Was Raised In A Timely Manner In The State Proceedings Below.

Respondent argues that Petitioner did not raise the federal constitutional claim in her appellate brief to the North Dakota Supreme Court. Even if this were the case, this would not end this Court's analysis. Rather, it would need to determine whether the Petitioner, in fact, had a reasonable opportunity to raise the federal issue in her state court appellate brief. If she did not, this Court would then need to determine at what point Petitioner ***did*** have the first reasonable opportunity to present her federal issue, and if she did so at that point. *Michel v. Louisiana*, 350 U.S. 91, 93 (1955); *Parker v. People of State of Illinois*, 333 U.S. 571, 574 (1948); *Amalgamated Food Emp. U. Local 590 v. Logan Val. Plaza*, 391 U.S. 308, 335 n. 3 (1968) (Harlan, J., dissenting) (citing *Central Union Tel. Co. v. City of Edwardsville*, 269 U.S. 190, 194-95 (1925)).

The first reasonable opportunity that Petitioner had to raise her federal constitutional claim was in her petition for rehearing because (1) the North Dakota Supreme Court limited the issues on appeal and (2) Petitioner's constitutional claim was not ripe.

On December 16, 1999, Disciplinary Counsel filed Objections to Order of Dismissal with the North Dakota Supreme Court, objecting to the Disciplinary Board's order that "it was not proven by clear and convincing evidence that" Petitioner violated "Rule 3.4(a), NDRPC" and "Rule 4.4, NDRPC." *See* Petitioner's Reply Appendix P, at 78a-79a. On December 21, 1999, the North Dakota Supreme Court advised the parties that simultaneous briefs would be "***limited to the objections raised***." *Id.* at 80a. (Emphasis added). Consequently, Petitioner not only did not have a reasonable opportunity to raise the federal due process issue in her appellate brief, but was expressly forbidden from doing so by the North Dakota Supreme Court.

In addition, it wasn't until the North Dakota Supreme Court, in its decision of May 18, 2000, invoked its "inherent authority" under N.D.R.L.D. 3.1(H) ***against Petitioner*** that her constitutional issue was ripe for review. Prior to this, Petitioner had no claim of a constitutional violation. The North Dakota Supreme Court has held that generally a litigant may challenge the unconstitutional application of a state law only as it relates to the litigant's conduct or circumstances. *In the Interest of C.W.*, 453 N.W.2d 806, 810 (N.D. 1990); *State v. Anderson*, 427 N.W.2d 316, 319 n. 1 (N.D. 1988). Because Petitioner's constitutional claim was not ripe until after the court's decision, the petition for rehearing was the first opportunity to raise her due process claim.

Respondent argues that Petitioner, by citing to *Disciplinary Action Against Anseth*, 562 N.W.2d 385 (N.D. 1997), "acknowledged and understood" that the North Dakota Supreme Court had the power "to review dismissal of disciplinary proceedings through the exercise of its inherent authority." Respondent's own documents show that Petitioner specifically argued that the appeal was not properly before the

court. *See* Respondent's Appendix A, at 1a. Petitioner's citation to *Anseth* was a mere acknowledgment of what the court did in that case, and in no way constituted a concession that what the court did could properly be done in Petitioner's case. Nor could it constitute a waiver of the federal due process claim raised by this Petition because *Anseth* did not address or determine such a claim.

Respondent further argues that Petitioner's federal due process claim in her petition for rehearing is a "vague allusion" to a constitutional provision. This Court, however, has never required a petitioner to cite "book and verse on the federal constitution." *See Picard v. Connor*, 404 U.S. 270 (1971); *Eddings v. Oklahoma*, 455 U.S. 104, 113-14 n. 9 (1982). This Court has stated:

> No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.

New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928); *Street v. New York*, 394 U.S. 576, 584 (1969).

In this case, Petitioner either "expressly or by clear intendment" raised her federal due process claim in the petition for rehearing. Petitioner argued as one of her four main points: "The 1998 Rules Of Lawyer Discipline Do Not Provide A Mechanism By Which This Court Should Ignore Procedural Irregularities In The Appeal And Invoke Its Inherent Power." *See* Petitioner's Appendix D, at 31a. Under

that heading, Petitioner asserted on several occasions that the North Dakota Supreme Court's actions violated her due process rights and that she was entitled to additional process than was given her. *Id.* at 31a-32a. In making her argument, Petitioner cited no state law or state court case, but, instead, specifically cited to this Court's decision in *In re Ruffalo*, 390 U.S. 544 (1968). *Id.* at 32a. This Court has held federal issues properly raised in state court proceedings where the petitioner cited cases decided by this Court in support of the claimed federal right. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 85-86 n.9 (1980); *Lear, Inc. v. Adkins*, 395 U.S. 653, 662 n. 10 (1969). Because of Petitioner's explicit reference to her "due process" rights and her citation to *Ruffalo* in support of her argument, she timely and sufficiently presented the federal due process issue to the North Dakota Supreme Court in her petition for rehearing.

Even if this Court were to conclude that Petitioner did not raise a federal due process issue in the state court proceedings, it could still exercise jurisdiction over this case by granting certiorari because the federal due process issue raised is a "mere enlargement" of and is "so connected with it in substance as to form but another ground or reason for alleging the invalidity of the [lower court's] judgment." *Bankers Life and Cas. Co. v. Crenshaw*, 486 U.S. 71, 78 n. 2 (1988); *Illinois v. Gates*, 462 U.S. 213, 248 (1983) (White, J., concurring in the judgment).

In anticipation that an ambiguity existed whether the federal due process question was raised by Petitioner or considered by the North Dakota Supreme Court, Petitioner sought a certificate from that court clarifying the federal question as permitted by this court's prior decisions. *Honeyman v. Hanan*, 300 U.S. 14, 18-19, 22 (1937); *Herb v. Pitcairn*, 324 U.S. 117, 128 (1945); *Lynum v. State of*

Illinois, 372 U.S. 528, 535-36 (1963); *Department of Mental Hygiene of California v. Kirchner*, 380 U.S. 194, 196, 198, 201 (1965); *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20, 21-23 (1974). The court, however, declined the request. *See* Petitioner's Appendix K, at 60a. Under these circumstances, and in the event of a finding of ambiguity by this Court, this Court should vacate the state judgment and remand for clarification of the federal due process question.

Finally, even if Petitioner did not adequately assert a federal claim in state court, this Court "has jurisdiction to review plain error unchallenged in the state court when necessary to prevent fundamental unfairness." *Webb v. Webb*, 451 U.S. 493, 502 (1981) (Powell and Brennan, JJ., concurring) (citing *Wood v. Georgia*, 450 U.S. 261, 265 n. 5 (1981)); *Vachon v. New Hampshire*, 414 U.S. 478, 479 n. 3 (1974) (per curiam); *Illinois*, 462 U.S. at 247 & n. 1 (White, J., concurring in the judgment). As set forth in the Petition and this Reply Brief, this case presents circumstances ripe for this Court's invocation of its jurisdiction to prevent "fundamental unfairness."

II. A Significant Federal Question Does Exist Under The Facts Of This Case.

Respondent's argument that no significant federal question is involved in this case because the Petitioner was afforded notice of the charges against her and an opportunity to present her defense is misplaced.

In defense of the North Dakota Supreme Court's actions, Respondent repeatedly refers to Rule 3.1(H) as giving the North Dakota Supreme Court the inherent power "to review" orders of dismissal. However, a plain reading of Rule 3.1(H) belies Respondent's argument.

According to the plain language of Rule 3.1(H), "[n]othing in these rules prevents the court ***from instituting*** disability or disciplinary proceedings on its own initiative." (Emphasis added). The term "institute" is a term of art in our judicial system. The "institution" of a proceeding means "[t]he commencement or inauguration of anything, as the commencement of an action. * * *" In legal practice, it means the "[c]ommencement of civil action or criminal prosecution." *See* Black's Law Dictionary p. 407 (5th ed. 1983). The word "institute" is synonymous with the term "commence," which means "[t]o initiate by performing the first act. To institute or start." *Id.* at 139. Similarly, to "[i]nitiate" means "[c]ommence; start; originate; introduce; inchoate. * * * " *Id.* at 401. By Respondent's own argument opposing this Petition, i.e., that the North Dakota Supreme Court "review[ed]" the Disciplinary Board's order of dismissal, Respondent concedes that the court's actions contradicts the plain language of Rule 3.1(H).

Under well-established rules of construction, "[t]he words of a rule are intended to communicate a meaning to those to whom they are addressed, rather than to carry some gloss, hidden rule in the minds of the judges who drafted the rule." *In re: Independent Counsel Kenneth Starr*, 152 F.3d 741, 745, n. 12 (8th Cir. 1998). This Court has held that the plain command of a statute should be given effect "even if doing that will reverse the longstanding practice under the statute and the rule." *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Leach*, 523 U.S. 26, 118 S.Ct. 956, 962 (1998). These principles are particularly relevant in lawyer disciplinary proceedings because disciplinary rules "are to be read strictly, resolving any ambiguity in favor of the person charged." *In re Thalheim*, 853 F.2d 383, 386 (5th Cir. 1988).

Rule 3.1(H) gave the North Dakota Supreme Court authority "to institute" disciplinary proceedings, but it did not permit the court to "review" on an appeal the Disciplinary Board's order dismissing the petition for discipline against Petitioner. It is this distinction that is at the heart of Petitioner's federal due process claim. Respondent would have this Court consider this difference of no consequence because "[t]he facts alleged in the Petition for Discipline and the Rules of Professional Conduct alleged to have been violated are the same facts and rules relied upon by the North Dakota Supreme Court," and that there is no significant federal due process issue at stake in this case. Respondent is wrong.

Granted, the charges that the North Dakota Supreme Court relied upon in suspending the Petitioner were the same as was raised by Disciplinary Counsel's appeal, but the Petitioner was denied the opportunity to raise other issues, such as *res judicata*, that may have precluded the "institution" of proceedings by the North Dakota Supreme Court following final adjudication on the merits by the Disciplinary Board. Petitioner's federal due process rights to notice and an opportunity to present a defense mandated that she be given an opportunity to present this *res judicata* defense, or any other appropriate defense. The issue of *res judicata* in lawyer disciplinary proceedings is a defense that has not been decided by the North Dakota Supreme Court, *In the Matter of the Application for Disciplinary Action Against Howe*, 257 N.W.2d 420, 424 (N.D. 1977), thus the issue is not foreclosed. In addition, cases from other state courts suggest that *res judicata* may be a viable defense depending on the facts. *See, e.g.*, *In the Matter of Mackay*, 416 P.2d 823, 838 (Alaska 1964); *Bar Counsel v. Board of Bar Overseers & Another*, 647 N.E.2d 1182 (Mass. 1995); *In re Conduct of*

Brown, 956 P.2d 188 (Or. 1998). Therefore, Petitioner was denied significant federal due process rights.

III. The Petitioner Was Suspended From The Practice Of Law Based On A Violation Of A Rule Of Law First Announced In The Same Decision By Which She Was Suspended.

Respondent, in its brief, misconstrues Petitioner's argument. What Petitioner argues is that it violated her federal due process rights when the North Dakota Supreme Court, in May 2000, gave a new and broader construction to N.D.C.C. § 14-02-05(2), part of the state's defamation statutory scheme, not previously laid down by the court, and then applied this new construction retroactively to Petitioner's 1998 conduct in suspending her based its conclusion that she knew or should have known that the court would construe the statute in the manner in which it did.

While Respondent argues that the law was clear in North Dakota that there can be no liability for defamatory statements that are privileged and that it was equally clear that a communication is privileged when it is given in a judicial proceeding, the law ***was not*** clear, at the time of Petitioner's conduct, that responses to a guardian ad litem's questionnaire, given to other individuals, were entitled to absolute privilege. In North Dakota in 1998, the law accorded absolute privilege only to those communications "within the zone of absolute privilege." *Pulkrabek v. Sletten*, 557 N.W.2d 223, 228 (N.D. 1998). In addition, the decision of the U.S. Court of Appeals for the Eighth Circuit in *Asay v. Hallmark Cards, Inc.*, 594 F.2d 692 (8th Cir. 1979), and other courts, arguably rendered any application of absolute privilege lost under the facts of this case, in view of the distribution of the responses to other individuals, and not just the guardian ad litem. *See*

Sullivan v. Birmingham, 416 N.E.2d 528, 530, 532 (Mass. App. 1981) (and cases cited).

IV. There Is A Conflict Between The North Dakota Supreme Court Decision And The Decision Of The Fifth Circuit Court Of Appeals And Other Circuits.

Respondent argues that there is no conflict between the North Dakota Supreme Court decision and *Thalheim* because that case dealt with the procedure and authority of a federal district court, whereas the Petitioner was disciplined by the highest court of North Dakota. At issue in both decisions, however, are federal procedural due process rights of attorneys in lawyer disciplinary proceedings. The criteria established by this Court in granting certiorari petitions expressly includes situations where there is a conflict between a state's highest court and a federal court of appeals on a federal issue. *See* Supreme Court Rule 10(b).

Respondent further argues that unlike Rule 3.1(H) in this case, *Thalheim* involved no reservation under the rules for initiating a disciplinary action in the absence of a recommendation by an attorney panel. However, because the North Dakota Supreme Court referred to Rule 3.1(H) as conferring on it "inherent authority," *Thalheim*'s analysis and conclusion as to application of inherent authority to the attorney disciplinary proceedings before it is instructive.

Respondent also challenges Petitioner's reliance on *Ted Lapidus, S.A. v. Vann*, 112 F.3d 91 (2d Cir. 1997). However, by depriving Petitioner of notice that the court would be relying on its authority under Rule 3.1(H) on an appeal, Petitioner was not able to put forth a defense against this exercise of the Rule 3.1(H) authority. The fact that this authority existed and the court had previously exercised

authority under this rule on appeal in *Anseth* does not constitute sufficient notice to satisfy due process. *Ted Lapidus*, *supra*.

Other than challenging *Thalheim* and *Ted Lapidus, S.A.*, Respondent makes no other specific challenge to Petitioner's conflicts except to make a blanket statement, unsupported by fact or legal argument, that these conflicts are "meritless." Contrary to Respondent's argument, the conflicts cited by Petitioner are real because, based on the language in those cases cited by the Petitioner in her initial Petition, the courts in those cases would have certainly decided the state court decision at issue in this case much differently. This Court has recognized that conflicts need not be direct, but may be a conflict in principle. *See, e.g., Ivan Allen Co. v. United States*, 422 U.S. 617, 623-24 (1975); *United States v. National Bank of Commerce*, 472 U.S. 713, 719 (1985); *Oregon Dept. of Fish and Wildlife v. Klamath Tribe*, 473 U.S. 733, 764 (1985).

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Dated: November ____, 2000.

Respectfully submitted,

/s/_____

Shirley A. Dvorak, *pro se*
Moosbrugger, Dvorak & Carter, P.L.L.P.
311 South 4th Street
Grand Forks, ND 58201
701-775-8146

APPENDIX P

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

[Dated December 16, 1999]

No. 3034-E-9804

IN THE MATTER OF THE APPLICATION FOR DISCIPLINARY ACTION AGAINST SHIRLEY A. DVORAK, A MEMBER OF THE BAR OF THE STATE OF NORTH DAKOTA	)

OBJECTIONS TO ORDER OF DISMISSAL

Disciplinary Counsel hereby makes the following objections to the Order of Dismissal entered by the Disciplinary Board in the above action on November 22, 1999:

1. That it was not proven by clear and convincing evidence that Shirley A. Dvorak violated Rule 3.4(a), NDRPC in that she was attempting to use legal means tp [sic] protect her client's rights and her action [sic] were not an unlawful obstruction of access to evidence.

2. That it was not proven by clear and convincing evidence that Shirley A. Dvorak violated Rule 4.4, NDRPC, in that she did not have as a substantial

purpose the embarrassment or the imposition of a burden on the complainant Debra K. Jacobs

Dated this 16th day of December, 1999.

/s/_____
Paul W. Jacobson (ID 03631)
Disciplinary Counsel
Disciplinary Board of the Supreme Court
P.O. Box 2297
Bismarck, ND 58502
(701) 328-3925

APPENDIX Q

Letter Dated December 21, 1999

Supreme Court of North Dakota

OFFICE OF THE CLERK
600 E BOULEVARD AVE DEPT 180
BISMARCK ND 58505-0530
(701) 328-2221 (Voice)
(701) 328-2884 (TDD)

Clerk of the Supreme Court
Penny Miller

Chief Deputy Clerk
Colette M. Bruggman

December 21, 1999

Mr. Paul W. Jacobson
Staff Counsel
Disciplinary Board
P.O. Box 2297
Bismarck, ND 58502-2297

RE: Disciplinary Board v. Shirley A. Dvorak
Supreme Court No. 990384

This will acknowledge receipt of the Objections to Order of Dismissal in the above matter. A copy has been distributed to each member of the Court.

Simultaneous briefs, limited to the objections raised, are due January 22, 2000. While Rule 3.1(G), N.D.R.

Lawyer Discipl., indicates counsel may file briefs limited to objections timely filed, the Court has not reviewed a disciplinary matter and held oral arguments without counsel setting forth their argument and the synopsis of the case in a brief. If you choose not to file a brief for the benefit of the Court, you do so at your own risk. After the deadline has passed, the matter will be set for oral argument on an appropriate term.

Sincerely yours

Penny Miller
Clerk
North Dakota Supreme Court

PM:ss

pc: Mr. Kermit E. Bye
Mr. Richard E.T. Smith, Chair, Disciplinary Board